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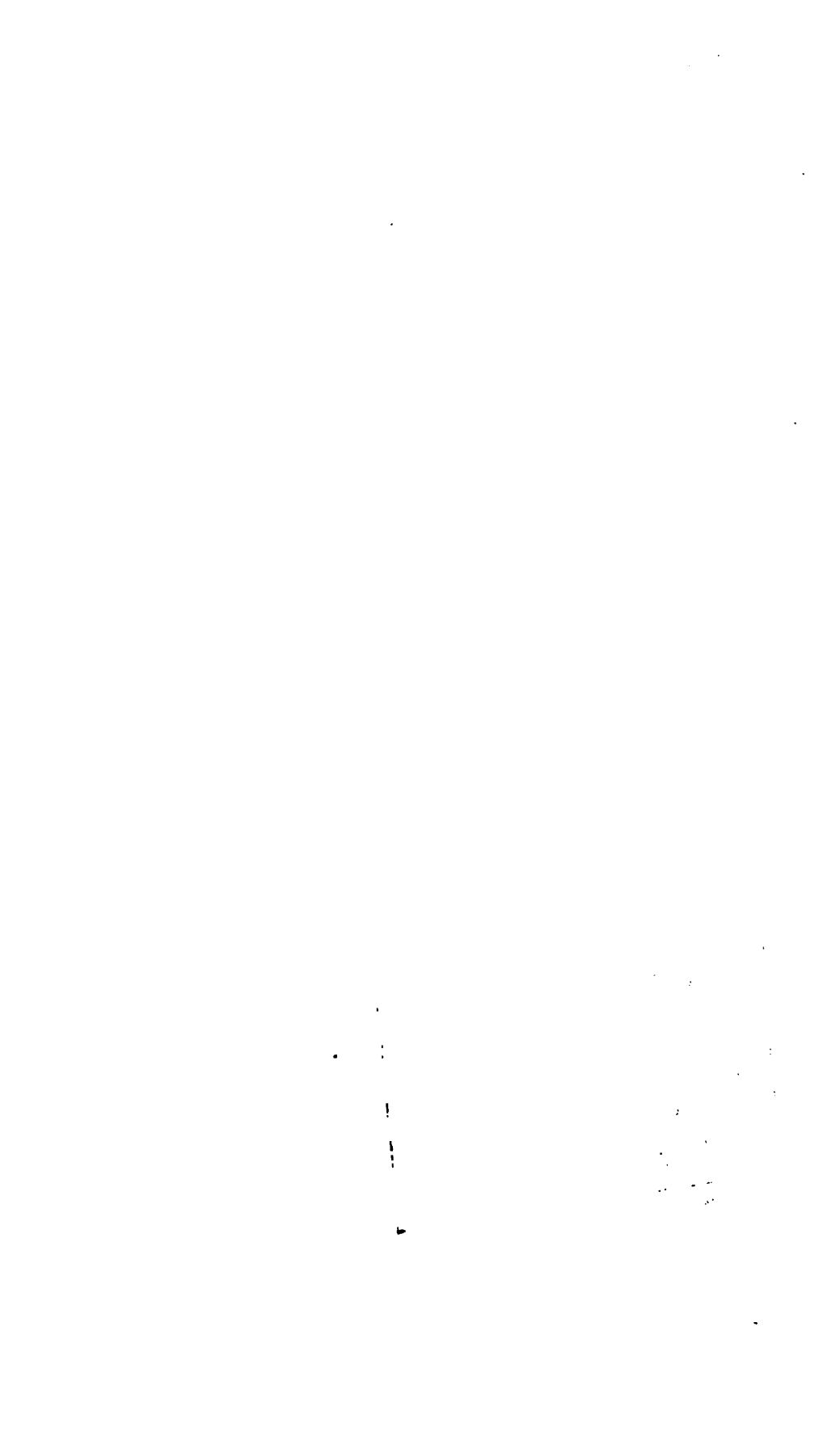
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ENGLISH REPORTS

IN LAW AND EQUITY:

CONTAINING REPORTS OF CASES IN THE

House of Lords, Privy Council,

COURTS OF EQUITY AND COMMON LAW;

AND IN THE

Admiralty and Ecclesiastical Courts;

INCLUDING ALSO

CASES IN BANKRUPTCY AND CROWN CASES RESERVED.

EDITED BY

EDMUND H. BENNETT & CHAUNCEY SMITH, ESQRS.,

COUNSELLORS AT LAW.

VOLUME I.

Containing Cases in the House of Lords, the Privy Council, and in all the Courts of Equity and of Common Law, from and after Mich. Term, A. D. 1850; also Crown Cases Reserved, and Cases in the Ecclesiastical and Admiralty Courts.

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DURING THE PERIOD OF THE DECISIONS REPORTED IN THIS
VOLUME.

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¹ The late Vice Chancellor of England, Sir Lancelot Shadwell, died at his residence, Barn Elms, Surrey, in July, 1850, and the Right Hon. Sir Robert Monsey Rolfe, Knt., was in December following promoted from the office of Vice Chancellor of the High Court of Chancery to that of Vice Chancellor of England, and was elevated to the peerage, with the title of BARON CRANWORTH, of Cranworth Hall.

² In vacation after Trinity Term, 1850, the Right Hon. Sir Thomas Wilde, Knt., was appointed Lord High Chancellor, and was created a peer, under the title of BARON TRURO, and Sir John Jervis, then Attorney General, was appointed Lord Chief Justice of the Common Pleas.

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A

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CASES
ARGUED AND DETERMINED
IN THE
HOUSE OF LORDS,

DURING THE YEARS 1850 AND 1851.

PRESENT:

THE LORD CHANCELLOR, *Lord BROUGHAM, and other Lords.*

BONAR *v.* MACDONALD.¹

March 1 and 27, 1849, and August 9, 1850.

Principal and Surety — Alteration of Liability of Principal.

In a bond by cautioners (sureties) for the careful attention to business and the faithful discharge of the duties of an agent of a bank, it was provided "that he should have no other business of any kind, nor be connected in any shape with any trade, manufacture, or mercantile copartnery, nor be agent for any individual or copartnery in any manner of way whatsoever, nor be security for any individual or copartnery in any manner of way whatsoever." The bank subsequently, without the knowledge of the sureties, increased the salary of the agent, he undertaking to bear one fourth part of all losses which might be incurred by his discounts:

Held, affirming the decision of the majority of the court below, that this was such an alteration of the contract, and of the liability of the agent, that the sureties were discharged, notwithstanding that the loss arose, not from discounts, but from improper conduct of the agent.

THIS was an appeal from an interlocutor pronounced by the First Division of the Court of Session in Scotland, in an action raised by the appellant against one David Bird, formerly agent at Dalkeith for the Edinburgh and Leith Bank, and the respondents, as cautioners for Bird's faithful discharge of the duties of his office. Bird did not appear to the action, but it was defended by the respondents, as his cautioners. The facts of the case were as follows: David Bird had been elected by the directors of the Edinburgh and Leith Bank to be teller of the said bank during the pleasure of the directors; but as a condition of his appointment, it was stipulated that he should give security and find caution as after mentioned. Accordingly, a bond of caution, dated the 16th January and 6th and 28th February, 1839, was entered into, and, after reciting the election of Bird as teller, and that he had procured the respondents as cautioners, it proceeded as follows: "Therefore he, the said David Bird, as prin-

¹ 14 Jur. 1077.

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cipal, and the said Colonel William Macdonald, William Ballantyne, and Archibald Torrance, as cautioners, sureties, and full debtors for and with the said David Bird, bound and obliged themselves conjunctly and severally, and their respective heirs, executors, and successors whomsoever, without the benefit of discussion, that so long as he, the said David Bird, should continue to hold the aforesaid office of teller of the said Edinburgh and Leith Bank, in consequence of the said election, or by annual reëlection or otherwise, he should have no other business of any kind, nor be connected in any shape with any trade, manufacture, or mercantile copartnery, nor be agent for any individual or copartnery, *nor be security for any individual or copartnery in any manner of way whatsoever*; and that he should carefully and diligently attend to the business of the said Edinburgh and Leith Bank, and faithfully discharge the duties of teller aforesaid, to the best of his skill and ability, and should well, fully, and truly account to the manager or to the directors of the said Edinburgh and Leith Bank for the time, for behoof of the said bank, for all sums of money, whether in specie or bank notes, bills, discounts, debentures, or other securities, with which he should be entrusted from time to time, or which should in any way come into his hands in the execution of the trust committed to him, and should pay and deliver to the said manager or directors for the time all sums of money belonging to the said bank, in his custody, whenever required so to do; and whatever loss, damage, skaith, or expense the said bank should happen to sustain or incur by or through him, the said David Bird, teller aforesaid, he, the said David Bird, as principal, and they, the said William Macdonald, William Ballantyne, and Archibald Torrance, as cautioners, sureties, and full debtors for and with the said David Bird, under the declaration therein, and after mentioned, thereby bound and obliged themselves conjunctly and severally, and their respective foresaids, to make good, refund, content, and pay to the said Edinburgh and Leith Bank, or to the manager thereof for the time, or to the directors thereof at Edinburgh for the time, for the use of the said bank, and that immediately upon their sustaining or incurring the said loss, damage, skaith, or expense, with a fifth part more of penalty over and above the payment and the legal interest of all such loss, damage, skaith, or expense from the time the same should be incurred till payment thereof; declaring always, as it is by the said bond specially provided and declared, that they, the said cautioners, were and should only be liable, by virtue of the said bond of cautionary, in the sum of 1000*l.* sterling, to which their security is restricted, and to be no further extended." David Bird entered on the duties of the said office of teller, and continued to discharge the same for some time after the date of the said bond. In the month of April, 1839, the directors of the said bank established a branch for conducting their banking business at Dalkeith, of which the said David Bird was appointed agent; and the said William Macdonald, William Ballantyne, and Archibald Torrance, by an addition to the bond before mentioned, dated the 11th and 18th April and 2d May, 1839, did thereby consent to the said alteration in the situation held by the said David

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Bird, and declared that, so long as he should continue agent as aforesaid, the whole obligations and stipulations of the bond should be applicable to, and have full force, strength, and effect, and be equally binding on them and their foresaids, for and in respect of the said David Bird as agent aforesaid, and that in the same manner as if the whole obligations contained in the said bond were there repeated. Bird accordingly entered upon the office of agent at Dalkeith, and continued to act in that capacity till the period of his dismissal as after mentioned. It appeared that in November, 1840, a person by the name of Moffat, who had a deposit account with the bank, applied to the bank for the purpose of obtaining a cash credit to the extent of 1500*l.*, offering certain parties as his sureties or cautioners. The bank agreed to this, on condition that three parties named became his cautioners. Two of the parties named did execute his caution bond, but the third, William Williams, did not, and positively declined doing so, but, nevertheless, Bird allowed Moffat to overdraw his account to the extent of 2005*l.*

The summons alleged, "that the said David Bird, in place of communicating, as he ought to have done, most improperly concealed from the manager and directors of the bank at Edinburgh the fact of the said William Williams having refused to sign the bond of credit, of which he had been made aware, and he retained the said bond in his possession, allowing it to be operated upon as aforesaid, so as thereby to induce the belief that it had been duly executed by all the parties, and regularly put in operation." That the bank superseded Bird on the 2d April, 1841, on account of the large overdrafts by Moffat. That the said Moffat became bankrupt on the 23d March, 1841, at which time he had overdrawn his account by 2005*l.* 11*s.* 2*d.*, and the bank had since received a dividend from his estate of 1*s.* in the pound, and that the residue had been rendered irrecoverable by the misconduct and malversation of the said David Bird, in the exercise of his said office of agent for the said bank, and in particular by his making the said advances without obtaining the foresaid bond of caution duly and validly signed; by his having made advances to the said Alexander Moffat before the said bond was delivered by him, even in its imperfect state; by his unwarrantably transferring to an account under that bond the large amount of the advances which he had previously made, without any security; and by his afterwards making advances to the said Alexander Moffat, beyond the amount of the bond, without any security.

The defence made by the cautioners to the action was, that, subsequent to the date of the last obligation undertaken by the defenders, new and positive liabilities were laid by the bank upon Mr. Bird, which were not covered by the transactions to which the defenders were parties. This was proved by a letter from Mr. C. I. Kerr, the accountant for the bank, to Mr. Bird, in the following terms: "Edinburgh and Leith Bank. Edinburgh, 14th May, 1840. My dear sir,—In consequence of the alteration in the terms on which you hold your appointment, you now being liable for a certain part of the loss arising from discounts, it will be necessary that you execute a

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new bond. I have not intimated it to your cautioners, as it will be better for you to do so yourself, but I will be glad that you take an early opportunity of advising me whether I shall reëxtend your bond by the same parties." Mr. Bird replied next day by a letter to the pursuer: "I have this morning received Mr. Kerr's letter regarding the alteration in the terms on which I hold my appointment, being liable for a certain loss arising from discounts, and that I will require to get executed a new bond, holding the sureties liable for any loss that may be sustained. I beg to say, in answer, that I really think that the directors are pressing the thing too hard; and if I was asked by any person to become their security on the same terms, I certainly would decline; and, on the same principle, I regret to say that I could not go forward to ask my present securities on these terms; but as far as I am personally concerned, I shall have no objection to sign any letter of guarantee or bond you may wish to that effect, by way of holding me liable for a fourth of the loss, and would thank you to impress upon the directors the unpleasant step they are wishing to enforce upon me. I believe none of the agents here are liable for any loss, and hold a great deal higher salaries; and I can assure you, if the directors establish this system, they will injure their branch business very much." No further steps were taken to obtain the reëxtension of the bond by the cautioners, and no communication whatever was made to them upon the subject, nor was any intimation given to them of the alteration of the terms upon which Bird held his appointment. It appeared that the alteration of the terms upon which Bird held his appointment was made on the 3d April, 1840; for a minute by the directors of the bank of that date stated, "The directors, having taken into consideration the manager's report, resolved to raise Mr. Bird's salary to 130*l.* per annum from and after the 1st day of April current, he being responsible for one fourth of the losses arising from his discounts." Upon Bird's letter of the 15th May being submitted to the directors, they, on the 22d May, 1840, entered a minute upon their books in the following terms: "The manager read a letter he had received from the agent at Dalkeith, objecting to ask his sureties to bind themselves for the fourth part of the losses which may be sustained in his discounts, but expressing his willingness to be personally liable therefor, as previously arranged, with which the board declared themselves satisfied."

Upon the case coming before the Lord Ordinary, he referred the cause to the Lords of the First Division, accompanied with a note, in which he stated his reasons to be in favor of the liability of the cautioners, to the extent of their bond. The Lords of the First Division, with the exception of Lord Jeffrey, were of a contrary opinion, and sustained the defence set forth in the second plea in law for the defenders, the cautioners of David Bird. The second plea was as follows: "The defenders are free from their cautionary obligation, in respect that the bank, without the consent or knowledge of the defenders, as his cautioners, altered the contract between them and the agent, so as to increase the liability of the latter." Against that interlocutor the present appeal was brought by the pursuer.

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George Turner and Anderson, for the appellant, contended that there was nothing in the agreement between the bank and Bird, as to the alteration of his duties, which could operate to discharge the sureties: that that agreement was nothing but in substance saying, "Instead of giving you 80*l.* a year, and taking the loss of discounts upon ourselves, we will give you 130*l.* a year; but, in consequence of doing this, you must be answerable for one fourth of the loss by discounts:" that this was not likely to make him less careful and diligent in his business, but quite the contrary: that if the attempt of the bank was to make the cautioners liable in respect of some improper discount transaction, then it would be a very different thing; but that here the loss had not been incurred by discounting, but by improper conduct of Bird, in the ordinary business of the bank. They cited *Eyre v. Everett*, 2 Russ. 381; *Parker v. Wise*, 6 Mau. & S. 239; *Ellice v. Finlayson*, 10 Shaw & Dun. 345; *M'Taggart v. Watson*, 1 S. & M'L. 553; and *Hamilton v. Watson*, 4 Bell's Ap. Cas. 67.

Bethell and C. Bailie, (of the Scotch bar,) for the respondents. This case is governed by clear principles both of Scotch and English law. A surety has an express interest in the well-being of the party for whom he contracts, and he has a right to say to the creditor, "You shall not alter his state of solvency. If you alter the position of the principal debtor, you discharge the liability of the surety." In some of the cases, where the alteration was clearly for the benefit of the principal debtor, the court has said to the creditor, "You ought not to take upon yourself to judge of that, but should have communicated with the surety." *Rees v. Berrington*, 2 Ves. jun. 540. In the present case, the alteration of the principal debtor's position materially affected the interests of the surety; he was answerable only for the honesty and attention to business of Bird, but this alteration has created a liability upon Bird for loss totally irrespective of honesty and attention to business. We admit that the bank might extend the powers of the agent as they pleased, but they cannot, by this extension, affect the liability of the surety. The question is not whether the loss arose by reason of the alteration of the situation, but whether the contract remained in its integrity. No authority has been cited for the affirmative of this proposition; and all the cases cited are divisible into two classes of cases, essentially different from the present: first, where the surety insisted upon his discharge upon the ground of the wilful omission of the creditor to sue the principal debtor; secondly, where the surety claimed his discharge upon the ground, that, at the time of the suretyship being entered into, the creditor knew more of the circumstances of the principal debtor than was known to the surety. But we rely upon the language of Lord Loughborough in *Rees v. Berrington*, "You cannot keep him (the surety) bound, and transact his affairs (for they are as much his as your own) without consulting him." [They cited also *Erskine*, book 3, tit. 3, s. 66; *Bell Prin.* s. 259; *Railton v. Matthews*, 3 Bell's Ap. Cas. 56; and *Bamford v. Iles*, 18 L. J., M. C., 49.]

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George Turner, in reply. I do not differ from the other side upon the question of law. The real thing to be considered is, whether, from any thing that has passed between the bank and Bird, there has been any extension of the obligation which was imposed upon the cautioners. We must construe the bond with reference to the situation of the parties at the time of their entering into it. Bird had been elected by the bank to the situation of teller, and he was subsequently promoted to the situation of agent; but there was no restriction upon the bank not to change the duties of the party as agent. If it was not to be competent to the bank to alter the duties to be performed by their servant, there should have been terms to that effect introduced into the bond. He was "faithfully to discharge the duties of agent," &c. How, consistently with that, can it be contended that he was not guaranteed faithfully to perform all his duties? [*Lord Chancellor*.—Your argument would only apply to duties generally imposed.] There is nothing in the bond which could prevent the bank altering the mode in which their business was to be conducted. The other side say, you have not only altered the terms by making Bird liable for one fourth of the losses by discounts, but you have broken one of the special terms of the bond, because Bird was not to be concerned in any other business, "nor be agent for any individual or copartnership," &c. This could not mean that he was not to be agent of the bank; it only means that he was not to be agent for any other parties. The other side have not referred to any authority to show that it was not competent for the bank to change the terms of their agency; if it were so, it would be impossible to make any alteration in the duties of agents; and I submit, that if such a condition was intended to be imported into the bond, it would have been inserted in it. The case of *Eyre v. Everett* (*ubi sup.*) establishes, that the mere increase of the principal debtor's liability will not discharge the surety. Suppose the bank, in the present case, had said to Bird, "You shall pay 25l. per cent. penalty upon any loss incurred through your misconduct," could not the bank have done so without discharging the surety? It is clear, that merely contracting a debt by the agent with the bank would not have discharged the surety.

The case stood for judgment.

Aug. 9, 1850. LORD BROUGHAM. My Lords, this case was heard last year by the late Lord Chancellor and myself. Three parties became what are called in Scotland cautioners for the faithful discharge of the duties of his office by a bank agent, who was moreover bound in a bond "to have no other business of any kind, nor to be connected in any shape with any trade, manufacture, or mercantile copartnership, nor be agent for any individual or copartnership, nor be security for any individual or copartnership in any manner or way whatsoever." Those were the terms of the cautionary obligation. The bank thereafter entered into an agreement with the agent, whereby he became liable for one fourth of the losses arising from discounts, and his salary was, in consequence, increased; but

the cautioners were not informed of this agreement. The court below held, that, in respect of the innovation made by the bank on his position, the cautioners were not liable in loss caused by the misconduct of the agent, and this notwithstanding that the loss sought to be recovered did not arise in consequence of any transaction under the new agreement. Now, my Lord Cottenham, with whom I entirely agree, has sent me this note of his opinion upon the subject, which I will read to your Lordships as part of my statement; but it is from my noble and learned friend, who is now absent: "The Court of Session decided this case in favor of the defenders upon the grounds raised by the second plea in law, that the bank, without the consent or knowledge of the defenders, the cautioners, altered the contract between them and the agent, so as to increase the liability of the latter. Concurring, as I do, with their opinion, it is unnecessary for me to observe upon the other grounds discussed by the Lord Ordinary. By the bond entered into by Bird, the agent, and the respondents, his cautioners, with the Edinburgh and Leith Bank, for the due performance by Bird of the duties of the office of teller of the bank, it was stipulated that he should have no other business of any kind, nor be connected in any shape with any trade, manufacture, or mercantile copartnery, nor be security for any individual or copartnery in any manner or way whatsoever. Upon Bird's appointment by the bank to be their agent for the branch at Dalkeith, a supplementary obligation was entered into, by which the cautioners conceded that their former obligation and all its provisions should be applicable to Bird's agency at Dalkeith. Whatever may be the usual duties and liabilities of an agent of a branch bank as to the discount of bills, it is clear, that, as between Bird and his principals, it was not considered that he was to have any thing to do with the business as agent of the Dalkeith branch, so as to impose any liability upon him, because a new arrangement was afterwards entered into between him and his principals, by which it was agreed that his salary should be raised to 130*l.* per annum, he being responsible for one fourth of the losses sustained by his discounts. This alteration in the contract between the principals and the agent is the ground relied upon by the second plea in law, and upon which the judgment is founded; and so sensible were the bank that this affected the liability of the cautioners, that we find their agent writing to Bird thus: 'In consequence of the alteration of the terms upon which you hold your appointment, you now being liable for a certain part of the loss arising from discounts, it will be necessary that you execute a new bond. I have not intimated it to your cautioners, as it will be better for you to do so yourself, but I will be glad that you take an early opportunity of advising me whether I shall reëxtend your bond by the same parties.' Bird objected to apply to his cautioners, and nothing more was done, they remaining in ignorance of, and certainly not being parties to, this alteration in the contract between Bird and his employers. The loss sought to be recovered against the respondents as cautioners, does not appear to have arisen from the discounting business, but to consist of a balance due from a customer of the

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branch bank, who was permitted to overdraw his account to an unusual and unreasonable extent, without security: but if the arrangement as to the discounts altered the subsisting contract between the bank and their agent, so as to increase the liability of the latter, his securities may be discharged for all purposes: such is the law of this country, and the law of Scotland is the same. The rule, as extracted from the English authorities, *Evans v. Whyte*, 5 Bing. 485; *Moo. & M.* 468; *Eyre v. Bartrop*, 3 Mad. 221; *Archer v. Hale*, 4 Bing. 464; and *Whitcher v. Hall*, 5 B. & Cr. 269; D. & Ry. 22, is, that any variation in the agreement to which the surety has subscribed, which is made without the surety's knowledge or consent, which may prejudice him, or which may amount to a substitution of a new agreement for a former agreement, and though the original agreement may, notwithstanding such variation, be substantially performed, will discharge the surety; and as to Scotland, in Bell's Principles, 71, the rule is laid down, that the cautioner is freed by any essential change consented to by the creditor in the principal obligation or transaction, without the knowledge or assent of the cautioner, which is supported by the authorities referred to. The only question, therefore, is, Was the arrangement as to discounts an essential change in the principal obligation? This the parties have themselves decided; for in stipulating that Bird should remain free from any engagement or suretyship for any other person, they admitted that his doing so would be injurious to the other parties to the contract; and it would not be less so because the engagement and suretyship was for the benefit of the bank, being, as it was, to the prejudice of the cautioners. This stipulation precludes the pursuer from contending, with success, that the arrangement as to discount was immaterial to those interested in the suretyship, or was collateral to and independent of it; and these are the only grounds upon which he relies. I am, for these reasons, of opinion that the interlocutor appealed from was right, and that the appeal ought to be dismissed, with costs." My Lords, agreeing entirely with the view of my noble and learned friend, I move your Lordships that the interlocutor appealed from be affirmed, with costs. — *Interlocutor affirmed, with costs.*

It is settled that any variation in a contract of suretyship, made by the creditor and the principal, without the assent of the surety, will discharge such surety, although he be not injured, but really benefited thereby. *He has a right to stand upon the very terms of his contract.* If the contract has been altered in the slightest particular, without the assent of the surety, he may say, "*Non in hæc fœdera veni.*" See *Miller v. Stewart*, 9 Wheaton, 680; *United States v. Tillotson*, Paine,

305; *United States v. Hillegas*, 3 Wash. C. C. R. 70; *Miller v. Stewart*, 4 Wash. C. C. R. 26; *Rathbone v. Warren*, 10 John. 597. But the giving of a new official bond by a postmaster will not discharge his sureties upon the former bond, for prior or subsequent defaults of the principal. *Postmaster General v. Reeder*, 4 Wash. C. C. R. 678. How far sureties for a cashier are liable for his defaults, see *Dedham Bank v. Chickering*, 4 Pick. 314.

Cottle, Ex parte.

In re THE WOLVERHAMPTON, CHESTER, AND BIRKENHEAD JUNCTION RAILWAY COMPANY, ex parte COTTLE.¹

August 5, 6, and 9, 1850.

Joint-stock Companies Winding-up Acts — Contributory — Provisional Committee-man, Liabilities of.

Decision of the Lords Commissioners of the Great Seal in this Case (14 Jur. p. 655) affirmed.

THIS was an appeal by the official manager of the above company, from the decision of the Lords Commissioners of the Great Seal, discharging an order of the Vice Chancellor of England, whereby the name of J. M. Cottle was ordered to be inserted upon the list of contributories to the above company, which was ordered to be wound up. The case upon the original hearing is reported 14 Jur. p. 453, and upon appeal, 14 Jur. p. 655.

Bethell and Glasse, for the appeal.

Rolt and W. M. James, contra.

Aug. 9. — Lord BROUGHAM. The great importance of this case renders it imperatively the duty of this Court of Appeal to examine minutely the grounds of the decree under consideration, and to review at large the authorities which bear upon the question, as well as the principles with which it is connected, and which must govern the final decree of this House. The question, and the only question, before your Lordships is, whether or not a person, by becoming a member of a provisional committee in a railway or other company not yet completely formed, but in the course of being formed, certainly not yet in active operation, but preparing for such operation, makes himself liable to the other members of the provisional committee, or to any of the officers of the association, in respect of the dealings between those other members or their officers, and third parties, strangers to the association. The respondent's name had been excluded from the list of contributories by the Master, acting under the Vice Chancellor's winding-up order, by the provisions of the two acts, 11 & 12 Vict. c. 45, and 12 & 13 Vict. c. 108. The Vice Chancellor, however, reversed the order of the Master, and restored the name of the respondent to the list of contributories. That decision was appealed against, and the Lords Commissioners reversed the order of the Vice Chancellor, and affirmed that of the Master, by which the name of the respondent was excluded from the list of provisional committee-men who were liable to pay contributions.

Now, the only question in this case relates to the effect of a party, with his consent, being a provisional committee-man; for though, during the arguments, a good deal was said on the prospectus, yet, first, we have not that document before us, nor had the Master; and, sec-

¹ 14 Jur. 703.

Cottle, *Ex parte*.

only, if we had, it clearly did not at all change the case, or alter the position of the respondent in relation to the company; therefore the question is quite general, and relates to the effect of a person allowing himself to be named as one of the provisional committee in any such concern. Now, let your Lordships consider, first, what is the legal liability which this allowed nomination imposes; for if it makes the party at all liable to those who contracted with the committee, past all doubt he would be a contributory within the 3d section of the first-named act. It appeared that considerable discrepancies existed between the decisions of the Court of Exchequer upon this point in the year 1846, and that the Court afterwards changed its view of the matter entirely within a very short time. *Barnett v. Lambert*, 15 M. & W. 489; s. c., nom. *Bartlett v. Lambert*, 10 Jur. 416, was decided in the month of May in that year, and there the Court held the committee-men to be liable. That was the principle upon which the decision had wholly rested; for although it was a fact in the case, that the defendant had attended and acted as a provisional committee-man, no reference whatever was made to that circumstance in the judgment, which proceeded entirely on this — that a person who consented to be a provisional committee-man was assumed to pledge his credit for things necessary to the committee. Well, in November the cases of *Reynell v. Lewis*, and *Wylde v. Hopkins*, 15 M. & W. 517; s. c., 10 Jur. 1097, were decided in the same Court, and the judges unanimously held that the committee-man was not liable for the acts of his fellows; the law not implying, from his mere consent to be a provisional committee-man, either an authority from him to make contracts by those other committee-men, or by the solicitors to the committee, or to the solicitors to make contracts on behalf of the committee, but merely as a promise to act with those others to carry the scheme into effect. The publication of the prospectus with his name was further held to make no difference. In those cases *Barnett v. Lambert* was cited for the plaintiff, but it was somewhat remarkable that no reference whatever was made to it in the judgment. Now, it would have been much more satisfactory had the learned judges at once admitted that they had erred in deciding the former cases, to which their new decision was wholly opposed. But this silence, carefully kept, was very much more to be commended than a practice sometimes allowed in such cases of erroneous judgments afterwards departed from; I mean the practice of endeavoring to find out special circumstances to distinguish the several cases, for the purpose of making it appear that they are reconcilable. Much bad law has in that way been occasionally introduced, and not soon got rid of, and parties have been encouraged to try points which ought to be regarded as desperate; and other Courts, which had consulted those conflicting cases, are not seldom misled in their search after authorities. No judge ought to be ashamed, after erring in judgment, to acknowledge his error; still less has a Court any reason for so unseemly a reluctance to admit that the dispensers of justice are subject to the common lot of humanity. The rule laid down by the Exchequer has since been followed by the unanimous concurrence of

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both the other Courts of common law. The Common Pleas, in *Barber v. Stead*, Hil. Term, 1847; 3 C. B. 946; s. c. 11 Jur. 90, and in *Wilson v. Holden*, Mich. Term, 1849; 12 Jur. 84, entirely adopted the cases of *Reynell v. Lewis*, and *Wylde v. Hopkins*. Lord Denman, too, has said, in terms, that there was not a single passage in those judgments of the Exchequer from which he dissented.

Your Lordships, therefore, have the clear and unhesitating opinion of all the judges of the common law Courts against the liability at law; and your Lordships have now, consequently, to consider how far that has been held on the other side of Westminster Hall, as either doubtful in a legal point of view, or insufficient to negative the liability of the provisional committee-man in equity and from equitable views. With that purpose your Lordships have been referred to Lord Cottenham's decision in *Besley's Case*, 14 Jur. p. 704. But, on a full consideration of what his Lordship said when he gave his judgment, I must deny that he intended either to depart from the doctrine laid down on the other side of the Hall in regard to the legal liability, or to state that the mere fact of consenting to be a provisional committee-man imposed an equitable responsibility. In the course of the argument he certainly evinced a leaning towards that view; but this was early in the discussion; and he prefaces his judgment by stating that the case does not require him to decide whether or not "the mere fact of the defendant remaining on the provisional committee after expenses are necessarily incurred would, were there nothing more, make him liable to any body; "for," says his Lordship, "the case does not require any observation on that part of it, because there is so much more as to make it unnecessary to consider that."

Those circumstances on which the decision turns are, his attending meetings when a managing committee is appointed, which reports on expenses incurred; his joining in an order for paying those expenses; his paying his share towards that expenditure; and his still consenting to allow his name to remain on the committee. His Lordship's view is, that his name was known by him to continue, that his liabilities thence arose, and that he paid his share acting on that liability; by which his Lordship means to imply an admission, on the provisional committee-man's part, of his liability. It is quite as unnecessary in the present case to consider whether or not his Lordship's view respecting these special circumstances is well founded, as it was for him in that case to consider the consequences of a mere consent to be on the provisional committee, because the circumstances of payment, or of joining in any order by a managing committee, are here wholly wanting. I may, however, observe that the mere fact of payment, on which the decision of *Besley's Case* mainly turns, seems not sufficient of itself to raise either a legal or an equitable liability. A man might submit to pay a certain sum, and refuse to pay more. Such a person might submit for the sake of peace, and also to avoid trouble and contention; or he might even admit that he was properly charged to a certain amount, in consequence of his having concurred in an order respecting a certain small expenditure, while he denied his liability ultra, and altogether denied his general liability. But

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into this it is unnecessary to enter, because the question now before us is relieved from the embarrassment of all such special circumstances. Therefore no aid whatever is derived from *Besley's Case* in any way in which it can be regarded; to which it is fit I should add, that the case itself is allowed and appointed to be reheard by the Lord Chancellor who has succeeded Lord Cottenham since he gave the judgment.

But here the appellant contended, that a party joining others in an adventure, or other concern, may become liable in equity to them, though not liable in law to them, or to third parties. Here we must distinguish as to the capacity in which such a liability is alleged to be incurred. In the present case there is no partnership. All authority holds that such an association is not a partnership. *Walstab v. Spottiswoode*, 15 M & W. 50. and *Reynell v. Lewis*, lay this down in express terms. Nor is any such connection seriously contended for in the argument here. They rather put it as an implied authority of principal to agent — as an authority given to contract for the party, and pledge his credit. But if so, there is no question of equitable as distinguished from legal liability; for, if there is any such authority by implication, the principal is bound at law; and the exceptions so often referred to in the two Exchequer cases, that the provisional committee-man is not liable, unless he has authorized the committee or its servants to pledge his credit, either expressly or impliedly, point to no equitable liability, but to a liability strictly and rigorously legal. It is difficult, then, to apprehend how the appellant can object to the doctrine laid down in giving the judgment appealed against, that the legal liability of the party is the measure of his equitable liability. I can see no other measure — I can perceive no other ground of that equitable liability. The proposition is repeatedly urged, that a party may be bound in equity who is not bound in law. No question he may; but then this is a very unfruitful position, unless you show some equitable obligation in the case under consideration, the legal liability being clearly gone by force of the decided cases at law. Much confusion has been imported into the arguments by the reference to contributions as a relief worked out by proceedings in Courts of equity; but the case is this — a right to relief by way of contribution exists at law, but it is so cumbrous, and liable to so much difficulty in working it out, and the Courts of law are so entirely incapable of dealing with many matters which are likely to occur in all such cases, that equity is resorted to for convenience. Still, it is not only not easy, it is not possible, to figure a case in which equity will decree contribution, unless against one who was legally liable to that which the complaining party has been sued for and has lost.

Let us take the case of the old writ of contribution — as by one copartner against his companion, in respect of expense incurred by suit or admission in the court; or by tenants in common of a mill which both are bound to repair, and one repairing it when fallen to decay, has his writ against his copartner for his share of the expense. In that case the writ expressly sets forth the common liability, and that because one has done the act, he may sue the other for his proportion to relieve himself. F. N. B. 162. Neither can it make any difference whether the

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liability — the common liability — is legal or equitable. If two persons jointly contract to do a thing, and one does it, he may have contribution against the other. Indeed, were one sued in equity for a specific performance, both must be made parties. But then both are liable; and if one does the thing without any suit, he has his relief against the other in respect of both being liable, and equally liable. For, observe, in this there is a legal liability, inasmuch as each may be sued at law for breach of contract. The case is ingeniously put of a joint or common adventure, as of a voyage, in which one agreed to find the ship, another the cargo, and a third the stores; and the ship owner recovers for the price of the ship against one. Then, it is said, the others are liable for their share, unless each furnishes his quota — the one the stores, the other the cargo. If they are so liable in respect of the price recovered by the ship owner, it can only be because they have made themselves liable to their companion, by an express contract to pay unless they furnished their quota, or by an implied contract to the same effect; and thus they are legally liable for breach of that contract, or they may be compelled in equity to perform it.

In no view, therefore, which I have been able to take of this case, can I perceive the least ground on which an equity can be raised as between the provisional committee-man and the rest of the committee or their officers, unconnected with, and independent of, the legal liability of that party, as having either expressly or by implication authorized his companions or their officers to pledge his credit with strangers. The law has been laid down by all the Courts, and it negatives any such authority, express or implied, in a case where no fact exists save only that of a consent to be on the provisional committee. Therefore the respondent, the defendant below, is not a contributory within the acts, and he ought not to be put on the list by the Master. The Lords Commissioners have, therefore, accordingly decided right in reversing the order of the Vice Chancellor, and directing the respondent's name to be expunged; and the judgment of your Lordships should be, that that order now appealed against be affirmed, and the appeal be dismissed with costs. — *Appeal dismissed, with costs.*

In re THE JOINT-STOCK COMPANIES WINDING-UP ACTS, 1848, 1849, AND
In re THE DIRECT BIRMINGHAM, OXFORD, READING, AND BRIGHTON
 RAILWAY COMPANY, (UPFILL'S CASE.¹)

August 6 and 7, 1850.

Provisional Committee-man — Contributory.

J. U. had allowed his name to be placed upon the list of the provisional committee-men of a proposed railway, but had never in any manner acted as such in the affairs of the company. The managing committee apportioned 100 shares in the company to each provisional committee-man; and the secretary of the company announced this by letter to J. U.,

¹ 14 Jur. 843.

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in answer to which he wrote, "I accept the 100 shares allotted to me;" writing after his signature "P. C." (Provisional Committee-man.) A few days afterwards the secretary forwarded to J. U. a regular letter of allotment of the 100 shares, requiring the deposit to be paid into one of the banks therein named, on or before a certain day, "or this allotment will be null and void." J. U. never took any notice of this, and never paid the deposit. No complete allotment of shares was ever made, no act of Parliament was applied for, and the project was abandoned; but preliminary expenses having been incurred, the company was ordered to be wound up.

Held, That J. U. was a contributory in respect of 100 shares; and that, irrespective of the question of partnership, the effect of a provisional committee-man accepting the allotment of 100 shares was an implied authority to his co-committee-men to pledge his credit for his proportion of the necessary expenses in preparing to launch the concern.

Seem, this company, or association, had advanced to that state which rendered it a proper subject of an order under the Winding-up Acts.

THIS was an appeal from a decision of Knight Bruce, V. C., (24th July, 1850,) sitting for the Vice Chancellor of England, whereby the decision of Master Brougham, placing James Upfill upon the list of contributories of the above company in respect of 100 shares, was reversed, and Upfill's name excluded from the list of contributories; and the official manager was ordered to pay the costs of the proceedings before the Master and of that application. The above company was formed in the year 1845, and was duly provisionally registered, according to the 7 & 8 Vict. c. 110. Its capital was to consist of 2,000,000*l.*, divided into 80,000 shares of 25*l.* each. Prospectuses were circulated among the public detailing the objects of the proposed company, the capital proposed to be raised, and the list of the provisional committee, amongst whom was the name of the respondent, James Upfill. On the 8th October, 1845, a meeting of the provisional committee was held, (but at which the respondent did not attend,) at which a resolution was passed appointing certain persons therein named a committee of management, and that they be authorized to allot shares. On the following day a meeting of the managing committee was held, at which one resolution, amongst others, was passed, to the effect "that the provisional committee have 100 shares each." The respondent received, in due course of post, the following letter from the secretary of the company:—

" Direct Birmingham, &c.

" 46 Moorgate Street, October 10th, 1845.

" Sir: I am requested to inform you that the committee of management has apportioned 100 shares in this company to each of the provisional committee; you will please inform me, on or before Wednesday morning next, whether you will take that or any less number. Should you not reply by that time, the committee will consider you decline taking any," &c.

In reply to such letter, the respondent sent the following letter to the secretary:—

" Bromyard, October 14th, 1845.

" Dear Sir: In answer to yours of the 10th instant, I accept the 100 shares allotted me in the Direct Birmingham, Oxford, Reading, and Brighton Railway.

Yours truly,

" JAMES UPFILL, P. C."

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On the 22d October, 1845, the respondent received from the secretary a letter in the following terms :—

“ Letter of allotment.

“ Not transferable.

“ Direct Birmingham, &c.

“ Capital 2000,000*l.*, in 80,000 shares of 25*l.* each. Deposit 2*l.* 12*s.* 6*d.* No. of letter, 8. No. of shares, 100.

“ 46 Moorgate Street, October 18th, 1845.

“ Sir: The committee of management have allotted to you 100 shares in this undertaking, and I am directed to request you will pay the deposit of 2*l.* 12*s.* 6*d.* per share, amounting to 262*l.* 10*s.*, into one of the under-mentioned banks on or before Friday, the 24th day of October, 1845, or this allotment will be null and void. This letter (with the banker's receipt appended hereto) will be exchanged for scrip, upon your presenting it at the offices of the company, and executing the parliamentary contract and subscribers' agreement, which will be at the above offices on and after the 27th October, and due notice will be given when the deeds will be sent in to the company. I am,” &c.

Appended to this was a list of bankers to whom the deposit might be paid. The respondent took no notice of this letter, and did not comply with the terms thereof, and was not applied to or required by the company to accept the said letter of allotment. The directors of the company never made a complete allotment of shares, and failed to raise sufficient capital to form the company, and in consequence thereof no act of Parliament was applied for to incorporate the company. The undertaking, therefore, wholly failed, and the project was abandoned. Expenses to a considerable amount were, however, incurred by the promoters of the company in and towards its formation, but the respondent had never in any manner interfered with the conduct or management of the company's affairs. Under the order for winding up the affairs of the company, the Master included the respondent's name as a contributory of the above company in respect of 100 shares of 25*l.* each. Knight Bruce, V. C., on the motion of the respondent, reversed that decision, as above stated, and his Honor's order having been enrolled, the present appeal of the official manager was brought direct to this House. The reasons assigned in support of the appeal were, First, the company was formed and constituted so as to come within the operation of the Joint-stock Companies Winding-up Acts. Secondly, the respondent, by becoming a member of the provisional committee, became a member of the company. Thirdly, the respondent, by accepting 100 shares in the company, became liable to contribute proportionally towards payment of the debts, liabilities, and losses of the said company, or some part thereof. Fourthly, the provisional committee, acting as it did in the name of the company, and assuming that denomination, became and was a company or association within the true intent and meaning of the Joint-stock Companies Winding-up Acts. Fifthly,

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the respondent is a contributory of the said company or association, within the true intent and meaning of the last-mentioned statutes. The reasons assigned against the appeal were, First, because the number of shares necessary to raise the proposed capital of the said company was never allotted. Secondly, because the 100 shares were not duly allotted to the respondent. Thirdly, because the letter of allotment, dated the 18th October, 1845, was conditional, and required to be accepted by the respondent in order to make it a contract binding on him; and he never did accept it. Fourthly, because the said letter of allotment, upon the face of it, became null and void if the deposit thereby required to be paid was not paid on or before the 24th October, 1845; and such payment was not made, nor ever required to be made. Fifthly, because the respondent never entered into any contract binding him to accept the number of shares mentioned in the letter of allotment, dated the 18th October, 1845.

Bethell and Roxburgh, in support of the appeal.

Rolt and W. T. S. Daniel, for the respondent.

LORD BROUGHAM: My Lords, in this case there is to a certain extent a similarity with the one just disposed of. (*Cottle's Case*, ante, p. 9.) The defendant had allowed his name to be put on the provisional committee, and signed himself with the initial letters "P. C." in his correspondence with that committee. So far the cases are identical; and were there nothing more, this must have followed the fate of the last. But, besides being put with his knowledge and consent on the committee, he was found by the Master to have accepted his shares as a provisional committee-man, and upon this ground he was held to be a contributory. Upon appeal, Knight Bruce, V. C., reversed the Master's order, and directed the name to be struck out. This order of his Honor is now before us by appeal. The evidence of acceptance rests on two, or it is contended by the respondent on three letters; one from the secretary, dated the 10th October, 1845, informs Mr. Uphill that 100 shares in the company had been apportioned to each provisional committee-man, and asks if he (Mr. Uphill) is willing to take them. His answer of the 14th October says, "I accept the 100 shares allotted;" not *apportioned*, but *allotted*; and he shows in what capacity he accepted them by signing with the addition of "P. C." to his name—provisional committee-man. It is contended there was no allotment, but only by the secretary's letter an apportionment. This, however, cannot be allowed, for whatever may be the phrase used in the secretary's letter, the answer of Mr. Uphill treats the act alone as an allotment—the act alone is an allotment. "I accept the 100 shares allotted to me." This, if it stood alone, would import an absolute acceptance. But there follows a third letter, four days later, from the secretary. It is headed, "Letter of allotment; not transferable;" it mentions the allotment of 100 shares, and adds that a deposit of 2*l.* 12*s.* 6*d.* on each share must be made on or before the 24th October, otherwise the allotment to be null and void. The letter of allotment was to be presented, and would entitle the party

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to obtain his scrip on executing the parliamentary contract and subscribers' agreement.

It is contended on the part of the respondent, that the acceptance was not final and complete till the third letter, because no terms had been stated in the first or second. But so no terms were indeed stated in the third. The price, the consideration for the shares, is not stated, or in any way referred to in any of the three letters, except that the shares are said to be 25*l*. shares, which Mr. Upfill must be taken clearly to have known when he became voluntarily a provisional committee-man, and accepted the 100 shares as such. Then it is alleged that the shares were said not to be transferable. If this made any difference, it is not true, for it is not that the shares are not transferable; it is only that the letter is not transferable; the letter of allotment, as it is called, is not transferable, and could not be transferred, because the first receiver took his scrip, and paid his deposit, and signed the contract in his individual capacity as a committee-man; and in that sense others received them in other capacities, and theirs were not transferable for the same reason. Then, as to the defeasance in not paying the deposit, that could make no difference in the right given before, or in the position in which Mr. Upfill stood between the 14th and the 18th October. I am, therefore, of opinion that the offer and the acceptance in the two first letters constitute a complete and absolute acceptance by Mr. Upfill of his 100 shares as a provisional committee-man, and that he became thereby a shareholder, as far as a person at that time could be a shareholder in the company, and became clothed with his full right to obtain the station of a shareholder when that should be more completely possible by the progress of the concern. It is true that, by a subsequent letter, he is directed to pay the deposit, and that he took no notice of that letter, and did not pay that deposit. Whether this determined his right to scrip and shares, or not, it is unnecessary to inquire; he became a shareholder on the 10th, or a person entitled to be a shareholder, by his own subsequent act, and which he could become if he chose to do what he was, by the rules of the committee he belonged to, called upon to do. It is very possible that no profit might result to him during the interval between the two letters of the 14th and the 18th October; but if any gain had been made, he would have had his share, and he could not withdraw at his option from the liability which this beneficial share of profit imposed.

It is not, as I think, necessary to inquire whether or not this constituted a partnership; but it appears to me impossible to avoid the inference, that a person who accepts shares in the joint stock of a concern, which he was at least preparing to carry on operations with the view of gaining profit, must be understood to be doing an act which entitles him eventually, at least, to share in the gains, and that he thus must be taken to give an implied authority to his companions on the committee to pledge his credit, so far as his ratable proportion goes in the capital of the joint stock, for the necessary expenses of the committee in preparing to launch the common concern. I hold that this authority, to be presumed from his acts, has the effect

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of making him incur a liability in respect of the things done by his companions of the committee or their officers; and I can find no decision at law to exclude the application of this sound principle to the case. If the Exchequer cases, (*Reynel v. Lewis*, and the other cases cited in *Cottle's Case*,) followed by the other Courts, had laid down another principle — if they had held that a committee-man, who had also accepted shares, in no respect authorized the incurring of the expenses required for the operations of the committee in respect of the concern to which those shares appertained, I should then have been obliged to deny that there could have been a legal liability, and it would have become necessary to consider whether or not the facts amount to a partnership. But I am of opinion, that, independently of the partnership, the liability exists. It may be said that no partnership could be constituted by the acceptance of shares until the company was formed; and the cases of *Nocknells v. Crosby*, 3 B. & Cr. 814, and *Fox v. Clifton*, 6 Bing. 776, in the Common Pleas, are relied on. These were cases of subscribers merely, and not of persons who were, by their own consent, in the management of the concern. The first case, that in the King's Bench, only held, that the consideration on which the money had been paid having failed, by the company not being established, the money could be recovered back in an action for money had and received to the plaintiff's use, without deducting for the expense of a secretary's salary, which secretary, as Holroyd, J., observed, had, in point of fact, never been appointed. The second case, in the Common Pleas, only held, that application for shares and payment of a first deposit did not constitute one a partner who had never interfered in the concern. Neither of these cases resembles the one at the bar; neither of them decides, that if several persons join in a plan to form a partnership, and one of them accepts a given proportion of the stock, which would give him certain rights were the partnership formed and in active operation, he can recover money paid for necessary expenses in the preliminary and provisional proceedings, or that he must not be held to give an authority, impliedly at least, to pledge his credit for the necessary expenses of the concern whereof he was a member. I therefore differ from the view taken below, and hold that the order of his Honor should be reversed, and Mr. Upfill's name restored to the list of contributories. I entirely agree with Lord Cottenham's first observation in giving the judgment in *Besley's Case*, 14 Jur. p. 704, in which he says, "I cannot for a moment entertain the idea that this company had not advanced to that state which made it the proper subject of an order under the Winding-up Act. It may be quite right to draw within the operation of the act an immense mass of associations, whichever you may call them, if they require the aid of the act; and if the concern goes on, whether you call it a company or an association, or whatever name it goes by, it is quite immaterial, because it is only the fact that it has become an association or company within the meaning of the Winding-up Act which would give the court the power to wind up its concerns." — *Judgment reversed.*

CASES

HEARD AND DETERMINED

BY THE

JUDICIAL COMMITTEE

AND THE

LORDS OF THE PRIVY COUNCIL,

DURING THE YEARS 1850 AND 1851.

PRESENT:

Members of the Judicial Committee: The Marquis of LANSDOWNE, (President,) Lord LANGDALE, M. R., Lord CAMPBELL, KNIGHT BRUCE, V. C., The Right Hon. Baron PARKE, The Right Hon. STEPHEN LUSHINGTON, D. C. L., Judge of the High Court of Admiralty, and the Right Hon. T. PEMBERTON LEIGH. Privy Councillors: The Archbishops of CANTERBURY and of YORK, and the Bishop of LONDON.

GORHAM *v.* THE BISHOP OF EXETER.¹

December 11, 12, 14, 15, 17, and 18, 1849, and March 8, 1850.

In the Church of England, many points of theological doctrine have not been decided.

The doctrines, that baptism is a sacrament generally necessary to salvation, but that the grace of regeneration does not so necessarily accompany the act of baptism that regeneration invariably takes place after baptism; that baptism is an effectual sign of grace, by which God works invisibly in us, but only in such as worthily receive it, in whom alone it has a wholesome effect; that, without reference to the qualification of the recipient, baptism is not in itself an effectual sign of grace; that infants baptized, and dying before actual sin, are certainly saved, but that in no case is regeneration in baptism unconditional, — are not contrary or repugnant to the doctrine of the Church of England.

THIS was an appeal by the Rev. George Cornelius Gorham against the sentence of the Dean of the Arches Court of Canterbury, in a proceeding termed a *duplex querela*, (see *post*, p. 601,) whereby the judge pronounced that the Right Rev. the Lord Bishop of Exeter had shown sufficient cause for refusing to institute Mr. Gorham to the vicarage of Brampford Speke. The facts of this case, and the grounds of the appeal, are stated in the judgment, and see *post*, p. 601.

G. Turner, Q. C., in support of the petition of appeal. The conclusion which might be drawn, from Mr. Gorham's examination, of his views on the subject of infant baptism, in respect of which these

proceedings were instituted, in fact, amounted to this. He held, that baptism was a change in the condition, but not in the nature of man; that spiritual regeneration was of the gift of the Almighty, which might be given before, in, or after baptism, as God pleased; that if infants receive baptism rightly, by which he meant worthily, grace must have been conferred before or at baptism; that in such case baptism is the sign of regeneration, and infants are grafted into the church, and entitled to the promises made, according to the 27th of the Articles of Religion; that if, on the other hand, infants do not receive baptism rightly, their baptism has no immediate spiritual effect; and that worthiness of reception is required to the effectual operation of the Holy Spirit. If the doctrine of the judge in the court below is the only doctrine consistent with that of the articles of the Church of England, then there is an end of the question. But the Church of England has nowhere declared her views with respect to infant baptism. To what sources are we then to resort to ascertain those views? The Articles are the code of the doctrines of the church, "for the avoiding of diversities of opinion, and for the establishing of consent touching true religion." The Prayer-book and services are the code of devotion. Expression of faith is according to the articles, not according to the devotional part of the services. The Stat. 13 Eliz. c. 12, provides, that if any person maintains or affirms any doctrine directly contrary or repugnant to any of the said articles, it shall be just cause to deprive such person of his ecclesiastical promotions; but he was not to be deprived for holding an opinion contrary to the Prayer-book. (2 & 3 Edw. 6, c. 9.) The sole and only purpose of the Prayer-book was to prevent the introduction of various services in different places. The Stats. 5 & 6 Edw. 6, c. 1, s. 5, and 13 & 14 Car. 2, c. 4, show, that it was never intended to establish, by the introduction of the Prayer-book, any thing touching the doctrine of the Church of England. The articles of 1552 contain an express reference to the Prayer-book and articles of ordination; this reference is omitted in the articles of 1562. Is not some weight to be attached to such an omission? Does it not, in fact, amount to a legislative enactment that the Book of Common Prayer was not a book of doctrine, but a form of prayer and administration of the sacraments? With respect to infant baptism at the time when the articles were prepared, various opinions obtained: the doctrine of the Church of Rome maintained that the new birth was effected absolutely, unconditionally, necessarily, instantaneously, indubitably, *ex opere operato*, by baptism; others considered that baptism was a mere sign and ceremony; and others, that infants ought not to be baptized at all. The following authorities show the doctrine of the Church of Rome: Corpus Jesus Canon; Decret. Gregory IX. lib. 3, tit. 4, s. 3; Constitut. Clementis Papæ, De Summa Trinitati, tit. 1, s. 2; Canones et Decreta Concilii Tridentis, sess. vii. can. 8, (Paris, 1666.) The opinion of the Anabaptists may be found in Memeyer's edition of the Confessions of the Church, and Zwinglius's De Sacramentis. Now, the 27th article of the Church of England negatives all three propositions. (Burnet on the Thirty-nine Articles.) So far

the articles declare negatively what doctrines are to be rejected, but they affirm the general connection between the sign which God has ordained for admission into the church, and the faith which that sign certifies. In the Latin exhibition of the 27th article, "De Baptismo," the word "signum" is said to graft into the church, and to seal the promises of God, as by an instrument; not to implant a new nature, which comes of the grace of God, and which must have been possessed, by those who receive baptism rightly, before the seal was affixed. In the first clause of the 25th article, "effectual signs of grace, by which God doth work invisibly in us," is to be construed in close connection with the declaration at the end of the article, with regard to the "wholesome effect or operation" of the sacraments, as rigorously limited to worthy recipients. To take the former part of the article in its naked verblatancy would contradict the clearest statement of Scripture and of the church herself; for if the effects and blessings were absolutely and unconditionally wrought on every infant, the Spirit would, of necessity, effect His operation in every infant at the moment when man thinks fit to direct; which is contrary to John i. 12, 13; John iii. 8; Gal. iii. 26; James i. 18; 1 Peter i. 3, 23. It may surely, therefore, be said that the Scriptures are silent as to the effect of infant baptism, and the church has not pledged itself to any particular view by its articles. There are other doctrines left undecided; for instance, that of predestination. The whole question is, whether the appellant's views of the doctrine are directly contrary to the doctrine of the Church of England. The articles have left the question open. The 6th and 20th articles, and his Majesty's declaration prefixed thereto, clearly show that some questions remained undecided, to be settled by Convocation. (Rogers on the Thirty-nine Articles.) [*Lord Campbell*.—Even in the Church of Rome some questions remained to be decided after the Council of Trent.] Doctrine can only be established by Convocation; no single bishop can lay down a doctrine. It is not the province of the Court of Arches to put an interpretation on the articles, and to prosecute all those who venture to think differently. (*Shore v. Wilson*, 9 Cl. & Fin. 335.) Martyr and Bucer both maintain, that, to make baptism effectual, there must be "faith and repentance;" and they were great authorities with Cranmer. In 1586, thirty years after the date of the articles, an order of the Upper House of Convocation directed every minister to provide a Bible and Bullinger's Decades; (2 Cardwell's Synodalia, 562;) and in 1588 this order was enforced by a letter from the archbishop and bishops. Now, the 5th Decade; the 7th Sermon on the Sacraments, b. 8, pp. 1002, 1016, 1048, 1062; Nowell's Catechism, pp. 161, 162; and the Liturgies of Edward VI., p. 12, all show that the services of the church were devotional exercises, but were not intended to fix the doctrines of the church. The meaning of the words "spiritual regeneration" is not settled. It had not been denied, and no one could deny, that spiritual regeneration might be given to infants; and, believing in the unbounded mercy of God, it was a reasonable and almost necessary consequence, that, in the services of the church, thanks should be rendered for that regener-

ation, as if actually given. It is true, that in all the services of baptism are contained absolute expressions of spiritual regeneration having actually been conferred; but they must be taken in connection with the services. The sacrament of baptism was figurative, being a representation and sign of blessings promised. The sponsorial promises in the case of infant baptism were also figurative; and yet, both in the services of adult and infant baptism, the expressions of spiritual regeneration are absolute. How can you look at these expressions, and not see that some contradiction exists between them and the language of the articles? In the case of adult baptism, absolute repentance and faith are required; and in the case of infants, a promise of repentance and faith. Can it be said that God requires faith and repentance in the one case, and disregards the promises in the other? If, in cases of adult baptism alone, the benefit is conditional, it follows that a different construction must be put on the same absolute expressions used in both the services. It may be said, that in private baptism no promises are required; but may it not be presumed that they were implied? Baptism is a sacrament—the sealing of the covenant between God and man. A covenant implies a mutual obligation; and when “man enters into a covenant with God,” man is bound to fulfil his part; and it can hardly be contended that the infant incurs no obligation by baptism. (Wall on Infant Baptism.) In the Office for Private Baptism, the church makes two absolute declarations of the regeneration of the child; nevertheless, in the concluding petition, it makes that which had been the subject of positive declaration again the matter of humble prayer, and therefore only of conditional expectation. Absolute terms must sometimes be used in the liturgical services in a symbolical, sometimes in a conditional, sense. What can be more absolute than our Lord’s affirmation, “This is my body”? and yet a literal interpretation of those words would lead us into the errors of the Church of Rome. Many of the answers in the Church Catechism are absolute, but must be treated as conditional; for instance, that to the second question, “Wherein I was made a member of Christ, a child of God, and an inheritor of the kingdom of heaven.” It is laid down in the rubric, that children, dying before the commission of actual sin, are undoubtedly saved; but it does not say, that by baptism regeneration is conveyed. In the versions of the Catechism previous to the latter end of the last century, there was a comma after the word “grace,” in the answer to the question, “What meanest thou by this word ‘sacrament’?” “I mean an outward and visible sign of an inward and spiritual grace, given unto us,” &c. The questions afterwards are, “What is the outward visible sign?” and next, “What is the inward and spiritual grace?” The answer to the latter question is, “A death unto sin and a new birth unto righteousness.” There is, then, this apparent inconsistency in the Catechism and the articles, that the articles lay down that grace and worthy reception are necessary to the wholesome operation of the sacrament; but the Catechism says, that by baptism the grace is conferred. An adult may go to the baptismal font without faith and repentance, and no one would deny that he receives no benefit; but

the Catechism, in terms, applies to all. The only way of reconciling this inconsistency is, by presuming that the services of the church are founded on the hope that the infant is a worthy recipient; but whether he was so, or not, was only known to Almighty God. Another proof that the services of the church are sometimes founded on hope, may be seen by reference to the burial service — “We therefore commit his body to the ground, &c., in *sure and certain hope*¹ of the resurrection to eternal life.” The church, then, assumes the language of unbounded confidence in the mercy of God. Similar language, but not quite so strong, is used in the Service for the Visitation of the Sick. When you see the language of the church so decided in two of its services, is it unfair to presume that it may be used in the same charitable sense in another of its services?

Dr. Bayford, (with G. Turner.) This is the first time since the Reformation, in which a clerk has had a sentence decided against him when he has founded his case on the articles of the church, and nothing has been proved on the other side to show in what manner, if at all, he has departed from those articles. If Mr. Gorham's views are unsound, it follows that the words of the 25th, 26th, 27th, and 28th articles, which refer to the right or worthy reception of the sacrament, are not applicable to infant baptism at all. The whole policy of the Church of England in its articles and services is inclusive, and not exclusive. The Prayer-books of 1549 and of Elizabeth strengthen that position, as also Heylin's History of the Reformation, and Ecclesiæ Restauratæ, vol. 1, p. 153; vol. 2, p. 285; Burnet's Reformation, 150, 347; 1 Palin, 228, (1551;); 2 Heylin's Hist. 228, 392. These authorities are historical facts confirming this position, and show that infant baptism was included in the articles. It must also be considered that, at the time the articles were framed, adult baptism was scarcely known, for then all were baptized in infancy; and, in fact, it was not until long after the Reformation that the service for the administration of adult baptism was drawn up. According to the authorities of the “Institution of a Christian Man,” called The Bishop's Book, 93; Formularies of Faith, 19, 193; The King's Book, (Henry VIII.) 254, it was held that infants did absolutely obtain, in and by baptism, remission of sin, and were made sons of God; that was the doctrine up to and after the time of the first Reformation; but when the ecclesiastical authorities of England proceeded to give their sanction to the articles, they were not actually silent upon the point of baptismal regeneration in and by baptism, but they expressed no opinions upon it. This was a pregnant silence, though they might have placed the subject dogmatically. The rubric at the end of the baptismal ser-

¹ “Spe” is the original Latin; “spes” may mean “expectation.” “Mala res, spes multo asperior.” (Sall. Cat. 13, 20.) “Naufragii spes omnis abijt.” (Stat. Th. 2, 129. Facc.)

————— “when to his wish
Beyond his hope Eve separate he spies.” — *Milton*.

“There is hope of a tree, if cut down, that it will sprout again.” — *Job*.

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vice, "It is certain, by God's word, that children which are baptized, dying before they commit actual sin, are undoubtedly saved," seems a confirmation of the view taken by Mr. Gorham of the articles; for if the words of the articles were unconditional as to all infants, this declaration would be unnecessary. [In confirmation of the appellant's views of the difference between the articles and rubric, and the devotional exercises of the church, he cited Cardwell's *Synodalia*, 113, 126.] Again, the rubric at the end of the service for adult baptism, in its second paragraph, is as follows: "If any persons not baptized in their infancy shall be brought to be baptized before they come to years of discretion to answer for themselves, it may suffice to use the Office for Public Baptism of Infants; or, in case of extreme danger, the Office for Private Baptism, only changing the word 'infant' for 'child' or 'person,' as occasion requireth." Suppose a person not fit for confirmation, (which is what is meant by "before they come to years of discretion,") but still of age to understand the nature of and to commit sin, can it be predicated of such child or person that the benefits of baptism are unconditional? (Bishop Burnet on the Sacraments, 314; Com. on the Twenty-fifth Article; Rogers on the Thirty-nine Articles; Com. on the Fifth Article, 1691.)

Dr. Addams, for the respondent. It is admitted that Mr. Gorham holds that there is no baptismal regeneration, unless the persons who receive baptism were made the recipients also of grace, by means of a divine act, before or at baptism. That doctrine was not to be found in the articles, or in the Prayer-book, or in the homilies of the Church of England. An attempt had once been made to limit the doctrines of the church to those contained in the Thirty-nine Articles, by act of Parliament, but no such act was ever passed, and the doctrines are not so limited. (*Jewel's Life of Cranmer*; *Cranmer's Works*, vol. 4, p. 273.) We contend, that baptism is an unconditional regeneration. That is not denied even in Rogers; Bishop Burnet's Com. 358; Mant's Prayer-book. Irenæus spoke of baptism and regeneration as convertible terms. Pope Innocent IV. held the same opinion; and from the letters of Clement V. it is manifest, that on this point there has never been any difference between the primitive church, the Church of Rome, and the Church of England. It is vain to say, that because the doctrine is affirmed by the Council of Trent, it was never affirmed before. That council affirmed many old doctrines. The charge of the Bishop of London, in 1842, said that the doctrine which denied baptismal regeneration might, perhaps, be reconciled with the 27th article, but it certainly could not be reconciled with the plain language of the offices. The doctrine had existed unquestioned for the first six centuries, and the Church of England held the same doctrines which were held by the Church of Rome during that period. Cranmer always supported this doctrine. (*Lawrence's Bamp. Lect.* 17, ed. 1838.) It is the opinion of the church, expressed by the highest authorities, that the words of the priest, in the administration of baptism, were the words of God, and that when he put his hands upon the child its new birth was effected.

Several of the articles were negative; if this doctrine was to be negatived, how was it that there was not an express article for the purpose? Even if the articles left it in doubt, yet, taken in connection with the liturgy, there could be no doubt. According to Bishop Taylor, Bishop Conybeare, and every writer of authority, the doctrines of the church were to be taken from the public acts, sermons, and homilies of the church, and so Mr. Gorham admitted in his book, (p. 121,) where he quotes the offices of baptism. "*Lex orandi lex credendi*" had always been the ecclesiastical maxim. Many of the offices were admitted to be dogmatic. Bishop Burnet's Exposition shows that the offices were to be looked to for the explanation of the articles, where they were ambiguous. In 1710 a representation was made by the Lower House of Convocation to the Upper, that a certain work had been published by a member of the church, containing articles contrary to the liturgies. Cranmer speaks of the confirmation which the articles receive from the liturgies. That also appears from the 30th and 57th canons. The rubric was added in the reign of Charles II. It was true that the offices had been submitted to Martyr and Bucer, who were Calvinists; but the office of baptism was drawn up by Bucer in conjunction with Melancthon, who certainly was not then a Calvinist; and, in fact, was taken from a form used by Luther. Waterland, in his Inquiry on Infant Communion, contends against the doctrine of communion being necessary to an infant baptized. Bishop Davenant admitted that original sin was remitted to all children who were baptized. Dr. Samuel Ward said that grace was conferred on all who presented no bar, and infants could present none such. Bullinger cannot be taken to be an authority as to the Church of England. Nowell's Catechism is precisely in the terms of the Church Catechism. As to the hypothesis, that many of the dogmatic expressions were only to be taken in a charitable sense, as expressing a hope, how could that be held in the Office of Visitation of the Sick, where absolution was only to be given in case of repentance? The offices of the church are four in number—public baptism, private baptism, adult baptism, and confirmation. That of adult baptism was only framed after the Savoy Conference; the others were substantially the same as when they were originally framed. When the first Service-book of Edward VI. was framed, the article on baptism was that of 1536, not of 1562; it was therefore impossible that the service could have been framed as was contended on the other side. The second Service-book was of 1651, and Bucer was consulted on that; but little alteration was made. (Lawrence's Bamp. Lect.) Alterations were again made by Elizabeth in the Prayer-book, not affecting the office of baptism. When James came to the throne the Millenary petition was presented complaining of the office, not of the doctrine, of baptism, the complaint being that the articles and doctrines of the church were Calvinistic; but they were not reformed at the Hampton Court Conference. The only attempt to reform them was in 1645 by the Long Parliament, who introduced Calvinistic forms, in which it was remarkable that the word "*renatus*" was translated in one place "*regenerated*," and

in another "baptized." After the Restoration came the Savoy Conference, at which the present Book of Common Prayer was established. The Presbyterian commissioners then objected to parts of the office of baptism affecting spiritual regeneration; but the bishops then insisted that baptism was regeneration. The present liturgy was then sanctioned by Parliament in the Act of Uniformity. Most of the alterations made were in opposition to the Presbyterians. (2 Cardw. Conf. 307.) One alteration was, however, made. Previous to the Conference the office was prefaced by the rubric, "Children, being baptized, are undoubtedly saved," which was altered, and the present rubric placed at the end.

Badeley, (with Addams.) We maintain that the articles and formularies of the Church of England are to be used concurrently, and that the Prayer-book is to be used as an explanation where the articles are not explicit. Forms of prayer are the strongest evidence of the belief of any church; many of them are actual declarations, as in the preface to the Office of the Communion appointed for Trinity Sunday, and in the Litany, where there are express declarations of belief in the Trinity. (Collect 8th Sunday after Trinity; Jeremy Taylor's Works, Heber's ed. vol. 7, p. 375.) The maxim "lex orandi lex credendi" occurs in some capitula of early date. (Barduin's Councils, vol. 1, p. 1257.) In Selden's Table Talk is a passage to the same effect—"There is no church without a liturgy," &c. The Book of Common Prayer is also imposed on every minister by the Act of Uniformity, Car. 2; he must give his "unfeigned assent and consent" to every thing contained in it, and may be proceeded against if he preaches contrary doctrine. The previous Acts of Uniformity (2 & 3 Edw. 6, c. 1; 5 & 6 Edw. 6, c. 1; 1 Eliz. c. 2) are all to the same effect, and refer to the same book. The 51st, 59th, and 73d canons of 1603 are to the same effect, and these canons are still binding. (*Middleton v. Croft*, Cas. t. Hardw. 57.) The Prayer-book comprehends the rubric, which prescribes the reading of the Catechism, which is a solemn declaration of the doctrines of the church. The Prayer-book, being affirmed by a statute later than the articles, must rather be taken to control the articles, and to explain the articles, which are in many instances not drawn with precision, as the 25th and the 11th. Many things are not touched by the articles, as the office of the Holy Ghost, the existence of Satan, and the duty of public prayer. [*Bishop of London.*—It was not denied by the other side that any distinct enunciation of doctrine in the Prayer-book was not to be disputed.] The articles and formularies of the church, or at least the latter, do distinctly declare the doctrine of the spiritual and unconditional regeneration of infants in baptism. The 25th article treats of the sacraments generally, and as being the channels of grace. The expression used in the Latin is "signa," which is stronger than the English word "sign," and is by the fathers and ecclesiastical writers used differently from "signaculum," and is appropriated to the sacraments, as distinguished from mere outward ordinances. St. Zeno, ed. Verona, 1739. Facciolati. By the 27th

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article, baptism is declared to be a "signum" of regeneration, by which, "*tanquam per instrumentum*," these benefits are actually conferred. In the 25th article the same words are used as to both sacraments, and no one ever doubted that the sacrament of the Lord's supper was efficacious to those who rightly receive it. There can be but two classes of recipients—those who receive it worthily, and those who receive it unworthily: now the article declares that the baptism of young children is most agreeable with the institution of Christ, and it is absurd to say that the infant is an unworthy recipient if his baptism is agreeable with the institution of Christ. Again, in the 9th article it is said that original sin remains even in those that are regenerated; and afterwards, "although there is no condemnation for them that believe and are baptized;" which shows that in the opinion of the framers of the articles, baptism and regeneration are convertible terms. In the 15th, "although baptized and born again." In the 16th, it is to be understood that the Holy Spirit is received in baptism, otherwise the question could not be raised. I consider it, therefore, clear, that every article on the subject is clear and consistent, and that on the articles alone baptism must be held to be regeneration; but it is placed beyond all doubt by the five formularies of the Prayer-book. In the Office of Baptism of Infants, "None can enter into the kingdom of heaven except he be regenerate and born anew of water and of the Holy Ghost"—"that he may be baptized with water and the Holy Ghost, and received into Christ's holy church"—"that He will wash him, and sanctify him with the Holy Ghost, that, being delivered from God's wrath, he may be received into the ark of Christ's church." "We call upon Thee for this infant, that he, coming to Thy holy baptism, may receive remission of his sins by spiritual regeneration." Can words be more explicit? So also in the exhortation founded on the gospel: there is no doubt expressed, but that the infant is a worthy recipient—no other qualification alluded to. So also in the prayers. Then after the baptism, "Seeing now that this child is regenerate," &c.; an expression about which there can be no doubt. And in the thanksgiving, "We yield Thee hearty thanks that it hath pleased Thee to regenerate this infant with Thy Holy Spirit, to receive him for Thine own child by adoption, and to incorporate him into Thy holy church." The Office of Private Baptism is, if possible, more explicit. It shows that sponsors are not requisite, that crossing is not requisite, and that the use of water and proper words is sufficient to confer on the infant the full benefit of the sacrament, as appears by the thanksgiving. Then the certificate, "that the child is now, by the laver of regeneration in baptism, received into the number of the children of God;" and in the prayer are words to the same effect. In the Office of Baptism of such as are of Riper Years, "faith and repentance" are required; in the case of infants there are no conditions. Then in the Catechism the declaration is explicit—"my baptism, wherein I was made a member of Christ," &c. Then, in the definition of a sacrament, baptism is declared to be the instrument by means of which these benefits are conferred. It was contended that the words

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"given unto us" applied to "sign," and not to grace; but from Latin, Greek, French, and Spanish translations, that appears, from the genders, not to be the case. The Catechism then goes on to say, that, by the "inward and spiritual grace," we are "made the children of grace." In the homilies of Common Prayer and the Sacraments, near the beginning, "Now, with like or more brevity," &c. [*Lord Campbell*.—How old is the expression "prevenient grace"?] I never heard of it as applied to baptism before: the expression "preventing grace" is used in the articles and elsewhere. Then, as to the question of "*opus operatum*," the term has been much misunderstood. Most of our divines have considered it as implying that a person receives the benefit of a sacrament *sine bono motu utentis*: that is not so, as appears by the Bohemic Confession, Corp. Lib. Symb. 300, Augusti, 1827. This shows that it could only have reference to adults, as they alone were capable of *bonus motus*; whereas, all that can be said of an infant, according to the expression of St. Augustin, was "*obicem non ponit*." In the 26th article of 1552, was notice of the *opus operatum*, but only as relates to adults; and even that passage was omitted in 1562. As far as relates to infant baptism, there is no difference between the doctrines of the Church of England and that of Rome. If the rite is duly performed, the baptism is efficacious to *worthy* receivers. Now, if infants are not worthy, they must be necessarily unworthy, and therefore, by the 25th article, "purchase to themselves damnation," which it is impossible to hold; else what is the state of parents who bring children to be baptized? How can the parents know whether there has been this act of prevenient grace? Besides, the church pronounces that she will receive infants, and therefore it cannot be supposed that they are unworthy. The child, it is true, promises by its sponsors, but these promises are not of the essence of the sacrament, which is conferred absolutely. Supposing baptism not to confer these benefits, what does confer them, when are they conferred, and what is the state of the child in the mean time? If baptism does not confer them, how can it be "*efficax signum*"? When a child dies, not having committed sin, Mr. Gorham holds that as evidence that the child has received prevenient grace, and is regenerate. Now, the church, as we contend, always held that such children were saved *by reason of their baptism*, as appears from the rubric. Where is any condition expressed? In the case of adults, the office of baptism admits and recognizes a condition, but never in the case of infants. In the office of marriage is a condition, "so many as are coupled together otherwise than God's word doth allow, are not joined together by God." In the case of the burial service there is not a distinct enunciation, but the expression of a hope; and that office is not to be used for such as die unbaptized or excommunicate. There is no room for the hypothesis of a charitable construction in the case of baptism. Why is it not said in the office of baptism, "our hope is, that this child is regenerate"? The articles must be subscribed unconditionally; (Co. 4 Inst. 323;) but here Mr. Gorham supposes prevenient grace as a condition to the benefit of baptism. The doc-

trine for which I contend has always been that of the church from the earliest times; and the Church of England is bound to refer to the authority of the primitive church, and of the fathers, and to the traditions of the church. (Jewel's Apology, near the end, "Accessimus autem," &c.; Canons of 1571, "Imprimis vero videbunt," &c.; Brett on Tradition, c. 1.) The general councils are also to be appealed to. (1 Eliz. c. 1; Wall on Infant Baptism, 50; Bingham's Antiquities of the Christian Church, b. 11; Hermas, in Wall, 50; Justin Martyr, Wall, c. 2; St. Irenæus, Contra Hæreses, lib. 2, c. 22, s. 4, in Wall, c. 3; Clemens Alexandrinus Pædag., lib. 1, c. 6, in Wall, c. 3; Origen, Hom. 14, Ben. ed., vol. 3, p. 948; St. Cyprian, Ep. to Jubianus; St. Gregory Naz., Ben. ed., vol. 1, p. 602; St. Zeno, 43d Sermon; Council of Carthage, 1 Hard. 147; 3 Routh's Rel. Sac. 74; Council of Milevis, 1 Hard. 1217; St. Augustin, Ben. ed., Ven. 1733, vol. 10, pp. 7, 14, 36, 63, 466; vol. 2, p. 263, p. 198, App.) Every volume of St. Augustin abounds with authorities to the same effect. The commissioners in the reign of Charles II. were directed to refer to the ancient liturgies, which are collected in Martene de Antiquis Eccl. Rit., and Assemani Cod. Lit. Eccl. Un., in which last is one of the oldest sacramentaries — that of Gelasius, which is quite in harmony with our own; so also are those at p. 6 of Assemani, and pp. 34, 40, 43, 75, 129, 211, 222, some of which are forms used in the Greek Church. [*Dr. Lushington.* — Do these authorities amount to more than saying, that baptism, with the grace of God, effects regeneration? *Bishop of London.* — You do not mean to say that the outward and visible sign, without the inward and spiritual grace, is sufficient?] I do not separate the sign from the thing signified. Whatever may be the case with adults, I contend that with infants the thing signified accompanies the sign. (3 Assemani, 15, 68, 74, which are eastern forms.) The same has been the doctrine of the English church. (5 Bede's Com. on c. xvi. of St. Mark, and on c. iii. of St. John; Canons in Spelman's Concilia, vol. 1, pp. 183, 263, 594; vol. 2, pp. 141, 166, 352, 445; Pupilla Oculi, part 2; Baptismus Fluminis, &c.; Effectus Baptismi, &c.; 1 Maskell's Mon. Rit. Eccl. Angl. 18, 75.) Such, then, having been the doctrine of the church, we will now come to the period of the Reformation. (The articles of 1536, given in Formularies of Faith, by Bishop Lloyd, on "Sacrament of Baptism," "Institution of a Christian Man," "Necessary Doctrine and Condition for any Christian Man," (Lloyd, 253;) Cranmer's Catechism, from which it appeared that Cranmer never changed his opinion on this point; Lee, 182, 187, Oxford edition.) As to Bucer and Peter Martyr, Peter Martyr held doctrines as to baptism inconsistent with those of the church. Bucer held, on many points, Catholic doctrines, and agreed as to baptism. (Corp. Lib. Symb., Augusti, 351; Ep. of Christian Doctrine and Religion; En. in Ev. Matthæi, c. xix.; John c. iii.) Melancthon did not differ on these points from Bucer; and these are said to have been Cranmer's advisers; and I deny that they were Calvinists, or that Cranmer held Calvinistic opinions. In the first Prayer-book of Edward VI., of 1549, Cranmer adopts the ancient prayers and doctrine; but whatever were his

views, we must be bound by the expressions used, which can no more be controlled by proof of what were his opinions, than an act of Parliament by proof of the opinions of the members. We then come to the articles of 1552, which are nearly in the same words as those of 1562. In the second Prayer-book of Edward VI. is the same doctrine. So matters went on till the Hampton Court Conference, where the discussions which took place between the commissioners and the Non-conformists show what was the opinion of the commissioners. The opinions of Bradford, as appears by his works, published by the Parker Society, were also that baptism was regeneration. Such were the opinions of Peter Martyr and of Ridley. (Bayford's Speech, 107, 153.) As to Bullinger's Decades, which were cited on the other side, they were never authorized by the church, and contain doctrines most offensive and heretical. It is true, that, by the order of 1586, clergymen were ordered to study them; but so they have been ordered to provide themselves with Fox's Book of Martyrs, which is full of errors; and so with Cardwell's Synodalia; and yet these books cannot be supposed, therefore, to be rendered authorities. In Mr. Gorham's answer is an express statement, (p. 71.) that when the promises are made by the sureties, "it is always with an express reservation, if these promises are not fulfilled, that the blessing is not conferred." Now, the church most distinctly declares, that in the case of all infants the blessing is received: the infant may forfeit it, but has received it. No sponsors are necessary; regeneration is effected, and the full grace of baptism received, by the mere administration of the sacrament with water, and the invocation of the Holy Trinity.

Turner, in reply. It has been stated that there has been no alteration in the articles on this subject since the Reformation; but this is not so. In the articles on baptism of 1552, the words "or not else" are omitted, and the words "rightly received" inserted. Remission of sin was an act done for us; regeneration was an act in us. Does the argument that infants are worthy recipients rest on more than assumption? Are we entitled to assume that it is the will of the Almighty that every infant shall be a worthy recipient? It has been said that "renatus" had been translated both "regenerated" and "baptized;" but can that outweigh the argument derived from the change in the articles of 1562 from those of 1536? The words in the Latin are, "renatis et credentibus,"—thus showing that they could not apply to infants. Then as to the authority of the Prayer-book. The statute of the 13 Eliz. had not been noticed. The Prayer-book was in the articles of 1552, but not in those of 1562. According to the doctrine of the other side, if an adult came to the font hypocritically, and was duly baptized, and then died, he was saved. [*Lord Langdale*.—Suppose the adult afterwards repented; would his baptism not be effectual then?] Archbishop Lawrence considered that infants were not eternally condemned for original sin, and that doctrine was the doctrine of the Church of Rome till the Council of Trent. We consider that the doctrine of *opus operatum* applies to adults and infants alike.

Gorham v. The Bishop of Exeter.

March 8, 1850. Lord LANGDALE delivered judgment. — This is an appeal by the Rev. George Cornelius Gorham against the sentence of the Dean of the Arches Court of Canterbury, in a proceeding termed a *duplex querela*, in which the Right Rev. the Lord Bishop of Exeter, at the instance of Mr. Gorham, was called upon to show cause why he had refused to institute Mr. Gorham to the vicarage of Brampford Speke. The judge pronounced that the bishop had shown sufficient cause for his refusal, and thereupon dismissed him from all further observance of justice in the premises, and, moreover, condemned Mr. Gorham in costs. From this sentence, Mr. Gorham appealed to her Majesty in council. The case was referred by her Majesty to this Committee. It has been fully heard before us; and, by the direction of her Majesty, the hearing was attended by my Lords the Archbishops of Canterbury and York, and the Bishop of London, who are members of her Majesty's Privy Council. We have the satisfaction in being authorized to state, that the Most Rev. Prelates the Archbishops of Canterbury and of York, after having perused copies of this judgment, have expressed their approbation thereof. The Bishop of London does not concur. The facts, so far as it is necessary to state them, are as follows: —

Mr. Gorham, being vicar of St. Just-in-Penwith, in the diocese of Exeter, on the 2d November, 1847, was presented by her Majesty to the vicarage of Brampford Speke, in the same diocese, and soon afterwards applied to the Lord Bishop of Exeter for admission and institution to the vicarage. The bishop, on the 13th November, caused Mr. Gorham to be informed that his lordship felt it his duty to ascertain, by examination, whether Mr. Gorham was sound in doctrine, before he should be instituted to the vicarage of Brampford Speke. The examination commenced on the 17th December, and was continued at very great length for five days in the same month of December, and (after some suspension) for three more days in the following month of March. The questions proposed by the bishop related principally to the sacrament of baptism, and were very numerous, much varied in form, embracing many points of difficulty, and often referring to the answers given to previous questions. Mr. Gorham did not at first object to the nature of this examination, but during its progress he, at various times, remonstrated against the manner in which it was conducted, and the length to which it extended. We are, however, relieved from the necessity of considering whether he could or could not lawfully have declined to submit to such a course of examination, because he did, in fact, answer nearly all the questions, and no complaint is made of his not having answered them all. The examination being concluded, the bishop refused to institute Mr. Gorham, for the reason (as stated in the notification) that "he had, upon the examination, found Mr. Gorham unfit to fill the vicarage, by reason of his holding doctrines contrary to the true Christian faith, and the doctrines contained in the articles and formularies of the United Church of England and Ireland, and especially in the Book of Common Prayer, and administration of the sacraments, and other rites and ceremonies of the church, according

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to the use of the United Church of England and Ireland." Mr. Gorham, being refused institution, commenced proceedings in the Arches Court of Canterbury; and, at his promotion, a monition with intimation issued on the 15th June, 1848, and thereby the bishop was monished to admit Mr. Gorham to the vicarage, and to institute and invest him therein, or otherwise to appear to show cause why Mr. Gorham should not be admitted and instituted by the Official Principal of the Arches Court of Canterbury. After litigation had thus commenced, and Mr. Gorham had called upon the bishop to state why institution was refused, it became evident that the reasons must be considered upon legal principles; and it was to be expected that both parties would require a strict and formal proceeding, in which the particular unsound doctrine imputed to Mr. Gorham would have been distinctly alleged. Unfortunately, this course was not adopted. The bishop prayed to be heard on petition; and in his act on petition he stated his charge against Mr. Gorham, and alleged that it appeared to him, in the course of the examination, that Mr. Gorham was of unsound doctrine respecting the great and fundamental point of baptism, inasmuch as Mr. Gorham held, and persisted in holding, that spiritual regeneration is not given or conferred in that holy sacrament,—in particular, that infants are not made therein members of Christ and the children of God,—contrary to the plain teaching of the Church of England in her articles and liturgy, and especially contrary to the divers offices of baptism, the office of confirmation, and the Catechism, severally contained in the Book of Common Prayer, and administration of the sacraments, and other rites and ceremonies of the church, according to the use of the United Church of England and Ireland. And in part supply of proof of the premises, the bishop referred to a book written and caused to be printed and published by Mr. Gorham, containing, amongst other things, the several questions put by the bishop to Mr. Gorham in the course of the examination, and Mr. Gorham's several answers to the same questions. Mr. Gorham made no objection to the mode of proceeding by act on petition, but put in his answer thereto; and thereby, after alleging that the book published by him, and brought into court by the bishop, contained a full, true, and accurate account of all the questions and answers which were given in the course of the examination, he distinctly and emphatically denied that he, in his examination, did maintain, or had at any time maintained, unsound doctrine respecting the efficacy of the sacrament of baptism, or that he had held, or persisted in holding, any opinions thereon at variance with the plain teaching of the Church of England in her articles and liturgy; and further, explicitly and expressly denied that he either held, or persisted in holding, that infants are not made in baptism members of Christ and the children of God; and he alleged that he did not maintain any views whatever contrary to the true doctrine of the Church of England, as dogmatically determined in her articles, familiarly taught in her Catechism, and devotionally expressed in her services, it having been his desire and endeavor, throughout the examination, to explain the language both of her articles and liturgy, in compliance with the express direc-

tions of the church herself, by such just and favorable construction as would secure an entire agreement, not only of each with the other, but of all alike, with the plain tenor of Holy Scripture, declared by the said articles to be of paramount and absolute authority. The bishop replied to Mr. Gorham's answer generally. The book published by Mr. Gorham was the only evidence adduced on either side; and with such allegations as are contained in the bishop's act on petition, and Mr. Gorham's answer, the case was brought on to be heard, with no statement on the part of the bishop of what was, in his lordship's view, the true doctrine of the Church of England in respect of the efficacy of the baptism either of adults or infants, nor any specification of the doctrine imputed to Mr. Gorham, except the general charge before stated; and no distinct statement on the part of Mr. Gorham of what, in his view, is the true doctrine of the Church of England, what is the particular doctrine which he himself maintains on the subject in question, or in what particulars, or for what particular expressions, he requires the just and favorable construction which he considers to be necessary and sufficient to secure the entire agreement between the articles and the liturgy and his doctrine. As this form of pleading was acquiesced in on both sides, neither party has any reason to complain of the other; *but those who are called upon to judge* of the matters in difference have great reason to complain, that, instead of their attention being directed, as it ought to have been, to specific propositions distinctly stated, and to the evidence directly applicable to those propositions, — instead of having a specific and precise statement of that which the bishop alleged to be the doctrine of the Church of England upon the matters in question, and upon which he meant to rely, and of the specific doctrine held by or imputed to Mr. Gorham, and alleged to be unsound, — the case is brought forward and left in such a form, that, without being supplied with any allegations distinctly stated, or any issue distinctly joined, we are called upon minutely and accurately to examine a long series of questions and answers — of questions upon a subject of a very abstruse nature, intricate, perplexing, entangling, and many of them not admitting of distinct and explicit answers — of answers not given plainly and directly, but in a guarded and cautious manner, with the apparent view of escaping from some apprehended consequence of plain and direct answers. The inconvenience of this course of proceeding is so great, and the difficulty of coming to a right conclusion is thereby so unnecessarily increased, that, in our opinion, the judge below would have been well justified in refusing to pronounce any opinion upon the case as appearing upon such pleadings, and in requiring the parties, even at the last moment, to bring forward the case in a regular manner by plea and proof. The case comes before us in precisely the same state; and although the counsel on both sides have used their best endeavors to remove the vagueness and uncertainty found in the pleadings, as well as in the examination, and have thereby much assisted us, they have not been able entirely to remove the difficulty.

In considering the examination, which is the only evidence, we

must have regard not only to the particular question to which each answer is subjoined, but to the general scope, object, and character of the whole examination; and if, under circumstances so peculiar and perplexing, some of the answers should be found difficult to be reconciled with one another, as we think is the case, justice requires that an endeavor should be made to reconcile them in such a manner as to obtain the result which appears most consistent with the general intention of Mr. Gorham, in the exposition of his doctrine and opinions. Adopting this course, the doctrine held by Mr. Gorham appears to us to be this—that baptism is a sacrament generally necessary to salvation, but that the grace of regeneration does not so necessarily accompany the act of baptism, that regeneration invariably takes place in baptism; that the grace may be granted before, in, or after baptism; that baptism is an effectual sign of grace, by which God works invisibly in us, but only in such as worthily receive it—in them alone it has a wholesome effect; and that, without reference to the qualification of the recipient, it is not in itself an effectual sign of grace; that infants baptized, and dying before actual sin, are certainly saved, but that in no case is regeneration in baptism unconditional. These being, as we collect them, the opinions of Mr. Gorham, the question which we have to decide is, not whether they are theologically sound or unsound—not whether, upon some of the doctrines comprised in the opinions, other opinions opposite to them may or may not be held with equal or even greater reason by other learned and pious ministers of the church—but whether these opinions now under our consideration are contrary or repugnant to the doctrines which the Church of England, by its articles, formularies, and rubrics, requires to be held by its ministers, so that, upon the ground of those opinions, the appellant can lawfully be excluded from the benefice to which he has been presented. This question must be decided by the articles and liturgy, and we must apply to the construction of those books the same rules which have long been established, and are by the law applicable to the construction of all written instruments. We must endeavor to attain for ourselves the true meaning of the language employed, assisted only by the consideration of such external or historical facts as we may find necessary to enable us to understand the subject matter to which the instruments relate, and the meaning of the words employed. In our endeavors to ascertain the true meaning and effect of the articles, formularies, and rubrics, we must by no means intentionally swerve from the old-established rules of construction, or depart from the principles which have received the sanction and approbation of the most learned persons in times past, as being, on the whole, the best calculated to determine the true meaning of the documents to be examined. If these principles are not adhered to, all the rights, both spiritual and temporal, of her Majesty's subjects, would be endangered. As the subject matter is doctrine, and its application to a particular question, it is material to observe, that there were different doctrines or opinions prevailing, or under discussion, at the times when the articles and liturgy were framed, and ultimately made part

of the law; but we are not to be in any way influenced by the particular opinions of the eminent men who propounded or discussed them, or by the authorities by which they may be supposed to have been influenced, or by any supposed tendency to give preponderance to Calvinistic or Arminian doctrines. The articles and liturgy, as we now have them, must be considered as the final result of the discussion which took place—not the representation of the opinions of any particular men, Calvinistic, Arminian, or any other, but the conclusion which we must presume to have been deduced from a due consideration of all the circumstances of the case, including the sources from which the declared doctrine was derived, and the erroneous opinions which were to be corrected.

It appears, from the resolutions and discussions of the church itself, and from the history of the time, that, from the first dawn of the Reformation until the final settlement of the articles and formularies, the church was harassed by a great variety of opinions respecting baptism and its efficacy, as well as upon other matters of doctrine. The church, having resolved to frame articles of faith, as a means of avoiding diversities of opinion and establishing consent touching true religion, must be presumed to have desired to accomplish that object as far as it could, and to have decided such of the questions then under discussion as it was thought proper, prudent, and practicable to decide; but it could not have intended to attempt the determination of all the questions which had arisen, or might arise, or to include in the articles an authoritative statement of all Christian doctrine; and in making the necessary selection of those points which it was intended to decide, regard was had to the points which were deemed to be most important to be made known to, and to be accepted by, the members of the church, and to those questions upon which the members of the church could agree, and that other points and other questions were left for future decision by competent authority, and in the mean time to the private judgment of pious and conscientious persons. Under such circumstances it would perhaps have been impossible, even if it had been thought desirable, to employ language which did not admit of some latitude of interpretation: if the latitude were confined within such limits as might be allowed without danger to any doctrine necessary to salvation, the possible or probable difference of interpretation may have been designedly intended, even by the framers of the articles themselves; and in all cases in which the articles, considered as a test, admit of different interpretations, it must be held that any sense of which the words fairly admit may be allowed, if that sense be not contradictory to something which the church has elsewhere allowed or required; and in such a case it seems perfectly right to conclude, that those who impose the test command no more than the form of the words employed, in their literal and grammatical sense, conveys or implies, and that those who agree to them are entitled to such latitude or diversity of interpretation as the same form admits. If it were supposed that all points of doctrine were decided by the Church of England, the law could not consider any point as left doubtful. The

application of the law, or of the doctrine of the Church of England, to any theological question which arose, must be the subject of decision; and the decision would be governed by the construction of the terms in which the doctrine of the church is expressed, viz., the construction which on the whole would seem most likely to be right. But if the case be, as undoubtedly it is, that in the Church of England many points of theological doctrine have not been decided, then the first and great question which arises in such cases as the present is, whether the disputed point is or was meant to be settled at all, or whether it is left open for each member of the church to decide for himself, according to his own conscientious opinion. If there be any doctrine on which the articles are silent, or ambiguously expressed, so as to be capable of two meanings, we must suppose that it was intended to leave that doctrine to private judgment, unless the rubrics and formularies clearly and distinctly decide it. If they do, we must conclude that the doctrine so decided is the doctrine of the church. But, on the other hand, if the expressions used in the rubrics and formularies are ambiguous, it is not to be concluded that the church meant to establish indirectly as a doctrine that which it did not establish directly as such by the articles of faith—the code avowedly made for the avoiding of diversities of opinions, and for the establishing of consent touching true religion. We must proceed, therefore, with the freedom which the administration of the law requires, to examine the Articles and the Prayer-book, for the purpose of discovering what it is, if any thing, which, by the law of England, or the doctrine of the Church of England as by law established, is declared as to the matter now in question, and to ascertain whether the doctrine held by Mr. Gorham, as we understand it to be disclosed in his examination, is directly contrary or repugnant to the doctrine of the church.

Considering, first, the effect of the articles alone, it is material to observe, that very different opinions as to the sacrament of baptism were held by different promoters of the Reformation, and that great alterations were made in the articles themselves upon that subject. The articles about religion, drawn up in 1536, state that it is offered unto all men, as well infants as such as have the use of reason, that by baptism they shall have remission of sin and the grace and favor of God; that the promise of grace and everlasting life (which promise is adjoined to the sacrament of baptism) pertaineth not only to such as have the gift of reason, but also to infants, innocents, and children, and that they ought, therefore, and must needs be baptized; and that by the sacrament of baptism they do also obtain remission of their sin, the grace and favor of God, and be made thereby the very sons and children of God, insomuch as infants and children dying in their infancy shall undoubtedly be saved thereby, and else not; that infants must needs be christened, because they be born in original sin, which sin must needs be remitted, which cannot be done but by the sacrament of baptism, whereby they receive the Holy Ghost, which executeth His grace and efficacy in them, and cleanseth and purifieth them from sin by his secret virtue and operation; and that

men or children, having the use of reason, and willing and desirous to be baptized, shall by the virtue of that holy sacrament obtain the grace and remission of all their sins, if they shall come thereto perfectly and truly repentant and contrite of all their sins before committed, and also perfectly and constantly confessing and believing all the articles of our faith; and, finally, if they shall also have firm credence and trust in the promise of God adjoined to the said sacrament—that is to say, that in and by this said sacrament which they shall receive, God the Father giveth unto them, for His Son Jesus Christ's sake, remission of all their sins, and the grace of the Holy Ghost, whereby they be newly regenerated and made the very children of God, &c. In the book entitled “A Necessary Doctrine for any Christian Man,” and called “The King's Book,” which was published in 1543, it is thus stated: “Because all men be born sinners,” “and cannot be saved without remission of their sin, which is given in baptism by the working of the Holy Ghost, therefore the sacrament of baptism is necessary for the attaining of salvation and everlasting life.” “For which causes also it is offered and pertaineth to all men, not only such as have the use of reason, in whom the same *duly received* taketh away and purgeth all kind of sins, both original and actual, committed and done before their baptism; but also it appertaineth and is offered unto infants, which, because they be born in original sin, have need and ought to be christened, whereby they, being offered in *the faith of the church*, receive forgiveness of their sins, and such grace of the Holy Ghost, that if they die in the state of their infancy, they shall thereby undoubtedly be saved; because as well this sacrament of baptism, as all other sacraments instituted by Christ, have all their virtue, efficacy, and strength by the word of God, which, by His Holy Spirit, worketh all the graces and virtues which be given by the sacraments, to all those that worthily receive the same.” The articles of 1552 and 1562 adopt very different language from the articles of 1536, and have special regard to the qualification of worthy and right reception. The 25th article of 1562 distinctly states, that in such only as worthily receive the same, the sacraments have a wholesome effect or operation. The article on baptism, in describing the blessings conferred by it, speaks only of those who *receive it rightly*; and with respect to infants, instead of saying, in the language of the articles of 1536, that “they obtain remission of their sins, and the grace and favor of God by baptism, and that, dying in their infancy, they shall be undoubtedly saved thereby, and else not,” it declares only, “that the baptism of young children is in any wise to be retained in the church, as most agreeable with the institution of Christ;” stating nothing distinctly as to the state of such infants, whether baptized or not. The articles of 1536 had expressly determined two points: first, that baptized infants dying before the commission of actual sin were undoubtedly saved thereby; secondly, that unbaptized infants were not saved. The articles of 1562 say nothing expressly upon either point; but, not distinguishing the case of infants from that of adults, state in general terms that those who receive baptism rightly have the benefits

there mentioned conferred. What is signified by *right reception* is not determined by the articles.

Mr. Gorham says, that the expression always means or implies a fit state to receive, viz., in the case of adults "with faith and repentance," and in the case of infants "with God's grace and favor." On a consideration of the articles, it appears that, besides this particular point, there are others which are left undecided. It is not particularly declared what is the distinct meaning and effect of the grace of regeneration — whether it is a change of nature, a change of condition, or a change of the relation subsisting between sinful man and his Creator; and there are other points which may very plainly be open to different considerations in different cases. Upon the points which were left open, differences of opinion could not be avoided, even amongst those who sincerely subscribed to the articles; and that such differences amongst such persons were thought consistent with subscription to the articles, and were not contemplated with disapprobation, appears from a passage in the Royal Declaration now prefixed to the articles, and which was first added in the reign of King Charles I., long after the articles were finally settled: "Though some differences have been ill raised, yet we take comfort in this, that all clergymen within our realm have always most willingly subscribed to the articles established; which is an argument to us that they all agree in the true usual literal meaning of the said articles, and that even in those curious points in which the present differences lie, men of all sorts take the articles of the Church of England to be for them; which is an argument, again, that none of them intend any desertion of the articles established." If the articles, which constitute the code of faith, and from which any differences are prohibited, nevertheless contain expressions which unavoidably admit of different constructions, — and members of the church are left at liberty to draw from the articles different inferences in matters of faith not expressly decided, and upon such points to exercise their private judgments, — we may reasonably expect to find such differences of opinion allowable in the interpretation of the devotional services, which were framed, not for the purpose of determining points of faith, but of establishing (to use the expression of the statute of Elizabeth) a uniform order of common prayer, and of the administration of the sacraments, rites, and ceremonies of the Church of England. In considering the Book of Common Prayer, it must be observed that there are parts of it which are strictly dogmatical, declaring what is to be believed, or not doubted; parts which are instructional; and parts which consist of devotional exercises and services. Those parts which are in their nature dogmatical must be considered as declaratory of doctrine; but as to those parts which are devotional, consisting of prayers framed for the purpose of being "more earnest, and fit to stir Christian people to the due honoring of Almighty God," some further consideration is necessary.

It seems to be properly said, that the received formularies cannot be held to be evidence of faith or of doctrine, without reference to the distinct declarations of doctrine in the articles, and to the faith,

hope, and charity by which they profess to be inspired or accompanied; and there are portions of the liturgy which it is plain cannot be construed truly without regard to these considerations. For the proof of this, the instance which seems to be most usually cited, and which is conclusive, is the service for the burial of the dead. So far as our knowledge or powers of conception extend, there are and must be at least some persons, not excommunicated from the church, who, having lived lives of sin, die impenitent — nay, some who perish and die in the actual commission of flagrant crimes; yet in every case, in the burial service, as the earth is cast upon the dead body, the priest is directed to say, and does say, “Forasmuch as it hath pleased Almighty God, of His great mercy, to take unto Himself the soul of our dear brother here departed, we therefore commit his body to the ground, earth to earth, ashes to ashes, dust to dust, in sure and certain hope of the resurrection to eternal life;” and thanks are afterwards given “for that it hath pleased Almighty God to deliver this our brother out of the miseries of this sinful world;” and this is followed by a collect, in which it is prayed, “that when we shall depart this life we may rest in God, as our hope is that this our brother doth.” The hope here expressed is the same “sure and certain hope of the resurrection to eternal life” which is stated immediately after the expression, “it hath pleased Almighty God, of His great mercy, to take to himself the soul of our brother here departed.” In this service, therefore, there are absolute expressions implying positive assertions; yet it is admitted that they cannot be literally true in all cases, but must be construed in a qualified or charitable sense — justified, we may believe, by a confident hope and reliance that the expression is literally true in many cases, and may be true even in the particular case in which to us it seems improperly applied. From this and other cases of the like kind, of which there are several in the services, it seems manifest that devotional expressions, involving assertions, must not as of course be taken to bear an absolute and unconditional sense. The meaning must be ascertained by a careful consideration of the nature of the subject, and of the true doctrine applicable to it. If expressions in devotional exercises and exhortations, which imply or convey assertions which may be true in any case, and which we are permitted in charity to hope may be true in the particular cases to which we are directed to apply them, were such that the assertions must be accepted as universal propositions necessarily and unconditionally true in all cases, they would amount to declarations of doctrine: but in the service for the burial of the dead such implied assertions are clearly not to be taken to be universal propositions; and it is plain that other assertions of the like kind, in other services, may fall within the same category.

In the Office for the Administration of the Public Baptism of Infants, the first rubric states the reason why it is convenient that the administration should be when the most number of people come together. The reasons are stated to be, “as well for that the congregation there present may testify the receiving of them that be new baptized into the number of Christ’s church, and also because, in the

baptism of infants, every man present may be *put in remembrance of his own profession made to God in his baptism.*" There is a prayer for the infant, that he (being delivered from wrath) may be received into the ark of Christ's church, and being steadfast in faith, joyful through hope, and rooted in charity, may so pass the waves of this troublesome world that he may come to everlasting life; another prayer, that the infant coming to God's holy baptism may receive remission of his sins by spiritual regeneration; an exhortation to the congregation, or to those present, not to doubt, but earnestly to believe, that God will favorably receive the present infant, and give unto him the blessing of eternal life—"Wherefore, we being persuaded of the good will of our heavenly Father towards this infant, and nothing doubting but that He *favorably alloweth this charitable work of ours in bringing this infant to His holy baptism*, let us faithfully and devotedly give thanks to Him;" and in the prayer which follows it is thus expressed: "Give Thy Holy Spirit to this infant, that he may be born again, and made an heir of everlasting salvation." Before the ceremony is performed, the sponsors are questioned, and make their answers; and then comes the prayer, in which it is said, "Regard, we beseech Thee, the supplications of this congregation; sanctify this water to the mystical washing away of sin, and grant that this child now to be baptized therein may receive the fulness of Thy grace, and ever remain in the number of Thy faithful and elect children." Thus studiously, in the introductory part of the service, is prayer made for the grace of God, that the child may receive remission of his sin by spiritual regeneration—so firm is the belief expressed that God will favorably receive the infant—so confident is the negation of all doubt but that God favorably alloweth the charitable work of bringing the infant to baptism. All this is before the ceremony is actually performed; and after the baptism has been administered, and during the continuance of the same persuasion and the same undoubting confidence of a favorable reception and allowance, the priest is directed to say, "Seeing now that this child is regenerate and grafted into the church, let us give thanks unto Almighty God for these benefits;" and after repeating the Lord's Prayer, thanks are thus given: "We yield Thee hearty thanks that it hath pleased Thee to regenerate this infant with Thy Holy Spirit, to receive him for Thine own child by adoption, and to incorporate him into Thy holy church." The service is followed by the rubric: "It is certain by God's word that children which are baptized, dying before they commit actual sin, are undoubtedly saved." And to the short form for the Administration of Private Baptism of Children in Houses, after a thanksgiving "for that it hath pleased God to regenerate the infant with His Holy Spirit, and to receive him as His own child by adoption, and to incorporate him into His holy church," there is appended a rubric—"And let them not doubt but that the child so baptized is lawfully and sufficiently baptized, and ought not to be baptized again." And if the child has not been so baptized by the minister of the parish, but by some other, the minister of the parish is to inquire by whom, with what matter, and with

what words the child was baptized; and if satisfied, he is to certify that all is well done, and that the child, being born in sin, and in the wrath of God, is now, by the laver of regeneration in baptism, received into the number of the children of God and heirs of everlasting life. The baptism thus referred to, and the effect of which is thus stated or expressed, is a baptism which may have taken place without any prayer for grace, or any sponsors; but it seems plainly to have been intended only for cases of emergency, in which death might probably prevent the ceremony, if not immediately performed; for such occasions, and the child dying, the church holds the baptism sufficient, and not to be repeated. One baptism for the remission of sins is acknowledged by the church; nevertheless, if the child, which is after this sort baptized, do afterwards live, the rubric declares the expediency of bringing it into the church, and appoints a further ceremony, with sponsors. The private baptism of infants is an exceptional case provided for an emergency, and for which, if the emergency passes away, although there is to be no repetition of the baptism, a full service is provided. The adult person is not pronounced regenerate until he has first declared his faith and repentance; and before the act of infant baptism, the child is pledged by its sureties to the same conditions of faith and repentance. And these requirements of the church, in her complete and public service, ought, upon a just construction of all the services, to be considered as the rule of the church, and taken as proof that the same promise, though not expressed, is implied in the exceptional case, when the rite is administered in the expectation of immediate death, and the exigency of the case does not admit of sureties. Any other conclusion would be an argument to prove, that none but the imperfect and incomplete ceremony, allowed in the exceptional case, *would be necessary in any case*. This view of the baptismal service is, in our opinion, confirmed by the Catechism, in which, although the respondent is made to state that, in his baptism, he "was made a member of Christ, the child of God, and an inheritor of the kingdom of heaven," it is still declared that repentance and faith are required of persons to be baptized; and when the question is asked, "Why, then, are infants baptized, when by reason of their tender age they cannot perform them?" the answer is—not that infants are baptized because, by their innocence, they cannot be unworthy recipients, or cannot present an obex or hinderance to the grace of regeneration, and are therefore fit subjects for divine grace—but "because they promise them both by their sureties, which promise when they come to age themselves are bound to perform." The answer has direct reference to the condition on which the benefit is to depend, and the whole Catechism requires a charitable construction, such as must be given to the expression, "God the Holy Ghost, who sanctifieth me and all the elect people of God."

It seems unnecessary for us to go through the other formularies in the Prayer-book. The services abound with expressions which must be construed in a charitable and qualified sense, and cannot, with any appearance of reason, be taken as proofs of doctrine. Our principal

attention has been given to the baptismal services; and those who are strongly impressed with the earnest prayers which are offered for the divine blessing and the grace of God, may not unreasonably suppose that the grace is not necessarily tied to the rite, but that it ought to be earnestly and devoutly prayed for, in order that it may then, or when God pleases, be present to make the rite beneficial. One of the points left open by the articles is determined by the rubric: "It is certain, by God's word, that children which are baptized, dying before they commit actual sin, are undoubtedly saved." But this rubric does not, like the article of 1536, say that such children are saved by baptism; and nothing is declared as to the case of infants dying without having been baptized. There are other points of doctrine, respecting the sacrament of baptism, which we are of opinion are, by the rubrics and formularies, as well as the articles, capable of being honestly understood in different senses; and, consequently, we think that, as to them, the points which were left undetermined by the articles are not decided by the rubrics and formularies, and that upon these points all ministers of the church, having duly made the subscriptions required by law, and taking Holy Scripture for their guide, are at liberty honestly to exercise their private judgment without offence or censure. Upright and conscientious men cannot, in all respects, agree upon subjects so difficult; and it must be carefully borne in mind that the question, and the only question, for us to decide is, whether Mr. Gorham's doctrine is contrary or repugnant to the doctrine of the Church of England, as by law established. Mr. Gorham's doctrine may be contrary to the opinion entertained by many learned and pious persons—contrary to the opinion which such persons have, by their own particular studies, deduced from Holy Scripture—contrary to the opinion which they have deduced from the usages and doctrines of the primitive church—or contrary to the opinion which they have deduced from uncertain and ambiguous expressions in the formularies; still, if the doctrine of Mr. Gorham is not contrary or repugnant to the doctrine of the Church of England as by law established, it cannot afford a legal ground for refusing him institution to the living to which he has been lawfully presented. This court, constituted for the purpose of advising her Majesty in matters which come within its competency, has no jurisdiction or authority to settle matters of faith, or to determine what ought, in any particular, to be the doctrine of the Church of England. Its duty extends only to the consideration of that which is by law established to be the doctrine of the Church of England, upon the true and legal construction of her articles and formularies; and we consider that it is not the duty of any court to be minute and rigid in cases of this sort. We agree with Sir William Scott in the opinion which he expressed in *Stone's Case*, in the Consistory Court of London: "That if any article is really a subject of dubious interpretation, it would be highly improper that this court should fix on one meaning, and prosecute all those who hold a contrary opinion regarding its interpretation."

In the examination of this case, we have not relied upon the doc-

trinal opinions of any of the eminent writers by whose piety, learning, and ability the Church of England has been distinguished; but it appears that opinions, which we cannot in any important particular distinguish from those entertained by Mr. Gorham, have been propounded and maintained, without censure or reproach, by many eminent and illustrious prelates and divines who have adorned the church from the time when the articles were first established. We do not affirm that the doctrines and opinions of Jewel, Hooker, Usher, Jeremy Taylor, Whitgift, Pearson, Carleton, Prideaux, and many others, can be received as evidence of the doctrine of the Church of England; but their conduct, unblamed and unquestioned as it was, proves at least the liberty which has been allowed in maintaining such doctrine. Bishop Jewel writes, "This marvellous conjunction and incorporation with God is first begun and wrought by faith; afterwards the same incorporation is assured to us, *and increased by baptism.*" Hooker writes, "We justly hold baptism to be the door of an actual entrance into God's house—the first apparent beginning of life—a seal, perhaps, of the *grace of election before received*; but to our sanctification, a step which has not any other before it." Archbishop Usher, in reply to the question, "What say you of infants baptized that are born in the church? Doth the inward grace in their baptism always attend the outward sign?" gives answer, "Surely, no; the sacrament of baptism is effectual only *to those, and to all those*, who belong to the election of grace." Bishop Jeremy Taylor says, "Baptism and its *effect may be separated*, and do not always go in conjunction. The effect may be before, and therefore much rather may it be after, its susception, the sacrament operating in the virtue of Christ, even as the Spirit shall move." There was even a time when doctrine to this effect was required to be studied in our church; and Whitgift, by a circular issued in the year 1588, enforced an order made in the year 1587, whereby every minister under the degree of Master of Arts was required to study, and take for his model, the Decades of Bullinger, as presented by the Queen and the Upper House of Convocation; and there it is declared, amongst numerous passages of a like tendency, "The first beginning of our uniting in fellowship with Christ is not wrought by the sacraments"—in baptism *that* is sealed and confirmed to infants which they had before. So with respect to the charitable interpretation of divine services, Hooker says, "The church speaks of infants as the rule of charity alloweth both to speak and to think." Bishop Pearson says, "When the means are used, without something appearing to the contrary, we ought to presume of the good effect." Bishop Carleton says, "All that receive baptism are called the children of God, regenerate, justified; for to us they must be taken for such in charity until they show themselves other." And Bishop Prideaux says, "Baptism only pledges an external and sacramental regeneration, while the church in charity pronounces that the Holy Spirit renders an inward regeneration." We express no opinion upon the theological accuracy of these opinions, or any of them.

The writers whom we have cited are not always consistent with

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themselves; and other writers of great eminence, and worthy of great respect, have held and published very different opinions. But the mere fact that such opinions have been propounded and maintained by persons so eminent and so much respected, as well as by very many others, appears to us sufficiently to prove that the liberty which was left by the articles and formularies has been actually enjoyed and exercised by the members and ministers of the Church of England. The case not requiring it, we have abstained from expressing any opinion of our own upon the theological correctness or error of the doctrine of Mr. Gorham, which was discussed before us at such great length and with so much learning. His Honor the Vice-Chancellor Knight Bruce dissents from the opinion we have formed, but all the other members of the Judicial Committee who were present are unanimously agreed in opinion, that the doctrine held by Mr. Gorham is not contrary or repugnant to the declared doctrine of the Church of England as by law established; and that Mr. Gorham ought not, by reason of the doctrine held by him, to have been refused admission to the vicarage of Brampford Speke. And we shall, therefore, humbly report to her Majesty, that the sentence pronounced by the learned judge in the Arches Court of Canterbury ought to be reversed; and that it ought to be declared that the Lord Bishop of Exeter has not shown sufficient cause why he did not institute Mr. Gorham to the said vicarage. We shall, therefore, humbly advise her Majesty to remit the cause, with that declaration, to the Arches Court of Canterbury, to the end that right and justice may there be done in this matter, pursuant to the said declaration.¹

THE EAST INDIA COMPANY v. PAUL.²

December 5 and 6, 1849, and February 15, 1850.

New Trial — Evidence — Statute of Limitations.

Where, at a trial in Bengal, the judge received certain documentary evidence, the Supreme Court, on an application for a new trial on the ground of such evidence being improperly received, should consider the importance of the evidence so received.

Certain salt, which A had contracted to sell to B, having been destroyed, in November, 1831. B demanded its delivery. Negotiations took place as to whether B was entitled to compensation, and continued till 1838, when A finally refused compensation; soon after which B brought his action against A;

Held, that the action was barred by the lapse of time.

THIS was an appeal from a rule of the Supreme Court of Judicature at Calcutta, by which a rule *nisi* for a new trial was discharged, with costs. The action, by the respondent, Oditchburn Paul, against

¹ This case, in point of time and historical connection, succeeds the case of *Gorham v. Bishop of Exeter*, in the Court of Arches, reported, *post*, p. 601, but the

order of arrangement prescribed for the cases in these reports renders its insertion here necessary.

² 14 Jur. 253.

the appellants, the East India Company, was in assumpsit. The declaration contained special counts on a contract for the sale and delivery of salt, alleging for breach the non-delivery of a considerable part of the salt, with the usual money counts. There were several pleas in bar, but the only plea now material was, that the action did not accrue within six years next before the commencement of the suit, the statute law of England upon this subject being in force at Calcutta. The trial took place before Grant and Seton, JJ., on the 25th and 26th July, 1842. It then appeared in evidence, that on the 15th March, 1822, at a public sale of salt, (a commodity of which the East India Company had a monopoly,) the plaintiff became the purchaser of 34,000 maunds, then lying in golahs or warehouses of the defendants, in the district of Hidgellee, where the salt was to be delivered. This was a portion of a larger quantity of salt lying in the said golahs. By the conditions of sale it was declared, that, on a payment in ready money being made, an order would be given for the delivery of an equivalent quantity of salt, and the purchaser would be furnished with rowannahs, (or permits,) which were necessary to enable him to be lawfully in possession of it. There was a further stipulation, that all the lots of the salt purchased should be cleared out from the several places of delivery within twelve months from the day of sale, otherwise the purchaser was to be subject to golah rent, and a deduction was to be made of half a maund on 100 maunds per measure from the quantity afterwards to be delivered. The plaintiff immediately paid the whole of the purchase money, and received rowannahs, which were to be in force for twelve months. These rowannahs were from time to time renewed, and the last rowannahs granted expired on the 28th November, 1831. In May, 1823, before any of the salt had been cleared, there was an inundation at Hidgellee, which destroyed part of the salt lying in the golahs, and damaged other part of it. Between that time and October, 1831, there were deliveries of salt to the plaintiff, amounting to nearly 20,000 maunds, and no more ever was delivered. On the 31st October, 1831, there was another inundation in the district of Hidgellee, which (as it was supposed by the company) had swept away almost the whole of the residue of the salt in the golahs. In November, 1831, the plaintiff presented the delivery orders and rowannahs at the golahs, and demanded the 10,000 maunds remaining to be delivered, but was told by the keepers of the golahs that no more salt remained to satisfy the contract. He then petitioned for a return of the purchase money, which was refused, on the ground that the loss had happened through his own negligence in not sooner clearing the salt from the golahs. However, the proper authorities consented that the matter should be inquired into by Mr. Donnithorne, the salt agent at Hidgellee, who, in August, 1832, made a report, in which he stated that, "if the purchaser had cleared the salt out of the golahs, according to his engagement, instead of perpetually offering objections, no defalcation would have arisen;" and he represented that the salt had been lost by wastage before the then late inundation. The plaintiff presented another petition, denying these facts, and praying that the

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purchase money for the 10,000 maunds deficient should be returned to him ; and on the 12th December, 1835, a fresh inquiry was ordered by the proper authorities representing the company, to Mr. Barlow, (another gentleman, who had succeeded Mr. Donnithorne,) by letter, containing the following instructions : " The board has always had the impression that the late agent was misinformed by his amlah, and that the merchant's salt was not in the golahs at the time of the inundation. Without wishing that you should be influenced by or adopt this impression, which had its origin partly in the reiterated declarations of many merchants, and partly in the opinion they entertained of the Hidgellee amlah," &c. Mr. Barlow did not make his report till the 16th May, 1838, upon which the company finally refused to return the purchase money claimed in respect of the deficient salt. The plaintiff commenced his action against the company on the 18th July, 1839, and obtained a verdict, with damages equal to the price of the whole of the deficient salt, and interest from November, 1831. At the trial various documents were read in evidence, which had been produced by virtue of a bill of discovery filed by the plaintiff against the company, although the company's answer, by their officer, which detailed the transactions, was not read. The rule for a new trial was obtained on two grounds — first, that these documents were improperly admitted in evidence without reading the answer to the bill of discovery ; and, secondly, that upon the evidence the Statute of Limitations was a bar. Cause being shown before Peel, C. J., and his brethren, he said it was unnecessary to decide whether the answer ought to have been read or not, as they were all of opinion that it did not contain any thing material to influence the verdict ; and that the East India Company having, upon the petition of February, 1832, consented to the renewed inquiry, no refusal to deliver the salt could be said to have taken place before the conclusion of that inquiry, which did not terminate until within six years of the time when the action was brought ; they therefore discharged the rule, with costs. From this decision the company now appealed, relying on the improper reception of evidence, and on the lapse of time as a bar to the action.

The *Attorney General* and *Loftus Wigram*, for the appellants. The cause of action commenced in February, 1832, when the warehouses were cleared of salt. *Howell v. Young*, 5 B. & Cr. 259. *Battley v. Faulkner*, 3 B. & Al. 288. *Short v. Macarthy*, Id. 626. The cause of action accrues not at the time when the plaintiff obtains knowledge of the fact, but when the breach actually occurs. It does not appear that there was any refusal to deliver ; but, in fact, there was no salt to deliver, and no request, therefore, necessary. [*Lord Campbell*. — When a chattel is delivered to be returned on request, and, the chattel being destroyed, request is made seven years afterwards for its delivery, would that be an answer to the action ?] The defendant could not set up his own wrong. Request is not necessary. *Short v. Stone*, 8 Q. B. 358. *Lovelock v. Franklin*, 8 Q. B. 371. *Colvin v. Buckle*, 8 M. & W. 680. Time would run from the time of breach, not from

the date of demand. *The Kennet & Avon Canal Co. v. The Great Western Railway Co.*, 7 Q. B. 824. *Pott v. Clegg*, 16 M. & W. 321; s. c. 11 Jur. 289. *Hodsdon v. Harridge*, 2 Saund. 631. An acknowledgment of the debt must be such a one as required by the 9 Geo. 4, c. 14. *Towler v. Chatterton*, 6 Bing. 258. [In support of the objection taken by the company, that if the documents were read, the answer, of which they formed part, ought also to have been read, he cited *Hewitt v. Pigott*, 5 Car. & P. 75, and *Long v. Champion*, 2 B. & Ad. 284.] The possession of the documents was obtained by an order made in the suit for discovery in equity, and was not an order to use, but merely to produce. [*Lord Campbell*.—Yes; but the judges could not decide whether the order was good or not; there was the order, and the proper course would have been to move to discharge it.]

Greenwood, contra. [*The Committee* informed the respondent's counsel that they had made up their minds with respect to the objection taken to the production of the documents without the answer, and that it therefore need not be argued.] From the nature of the contract, no special time for delivery is stated, and it might have been delayed from time to time without any breach. The rowannah (or permit) was only a fiscal regulation, and imposed a fiscal difficulty, but did not attach a particular time to the contract. The company were sellers, and the goods sold remained in their possession. The property never passed. *Simmonds v. Swift*, 6 B. & Cr. 857. [*Lord Campbell*.—No demand was made for delivery, but the inquiry was, what allowance would be made for the deficiency of the article which was to have been delivered?]

Leith, (with *Greenwood*.) All the cases referred to relate to conversion, and this case of destruction is to be brought within the same rule; but none of the cases cited decide the point, whether a party is bound to take a preceding wrongful act, which may or may not be known to him, as the breach of the agreement on which the right of action accrued. In this case there is not sufficient evidence to show the total destruction of the salt, and, in fact, the very inquiry instituted shows that it was not in the warehouses at the time of the inundation. Indeed, it is almost certain that it had been stolen or made away with by some of the keepers before the date of the inundation, and the non-completion of the contract was brought about by the fraud of the vendors' servants. But the judicial inquiry instituted, and the report of the officer, are sufficient acknowledgments to take the case out of the statute. *Collins v. Hale*, Chit. on Contracts, 45. *The East India Company v. Prince*, Russ. & M. 407. *Pierce v. Brewster*, 12 Moore, 515. [It was then argued that stat. 9 Geo. 4 did not apply.]

Wigram, in reply.

Feb. 15. LORD CAMPBELL, after stating the facts. We entirely agree with the Court below in thinking that the first ground on which the verdict was impeached cannot be supported. From the notes of

the trial set out in the application, there is a doubt whether the counsel for the company did more than object to the regularity of the order under which the documents were produced, and this certainty could not be inquired into at the trial. Supposing, however, that the answer ought to have been read, still, before a new trial is granted for withholding it, the defendants were bound to show that it might have materially influenced the verdict. The common law Courts in England have considered themselves compelled to grant a new trial if any evidence had been improperly admitted or rejected at *Nisi Prius*, however little it may weigh, because the objecting party might have tendered a bill of exceptions, upon which the Court of Error would be bound to grant a *venire de novo*; and to save the delay and expense of such a proceeding, it has been thought more convenient that a new trial should be granted by the Court in which the action was originally brought. But it has been certified to us by Sir Edward Ryan, the very learned ex-Chief Justice of Calcutta, that a different rule prevails in the Supreme Court there; and considering the constitution of that Court, and the line of distinguished men who have presided in it, strange would it have been if the rule had not been different. The same individuals being judges and jurymen, the proceedings would be preposterous if, in their capacity of judges, they were to grant a new trial, before themselves as jurymen, by reason of the admission or rejection of evidence which they feel could not alter the verdict. They very properly follow the practice of equity judges in England, where an issue has been granted, and an application is made for a new trial on the ground of the improper rejection or admission of evidence. Here no bill of exception lies, and although the objection is in strictness well founded, a new trial is granted or refused, according to the importance of the evidence which has been admitted or rejected. The learned judges in the present case thought that the answer could not have influenced their verdict. We have carefully read the answer, and have come to the same conclusion; we therefore think that, on the first ground, the verdict ought not to be disturbed.

It would have been very satisfactory to us if, consistently with the rules of law, we could have found evidence to show that any cause of action stated in the declaration arose to the plaintiff within six years before the commencement of his suit. There seems no doubt that the defendants have broken their contract with him, and that if he had commenced his action against them in February, 1832, instead of agreeing to the inquiry, which was conducted so tediously, he would have been entitled to damages equivalent to the salt which remained undelivered. But this inquiry, through the fault of the company's servants, was not terminated till the 16th May, 1838. Almost as soon as the final refusal of the company to return any part of the purchase money was communicated to the plaintiff, he commenced the present action. It will, therefore, be an extreme hardship on him if, by reason of this delay, which they occasioned, they may successfully defend themselves by pleading the Statute of Limitations. But it is the duty of all courts of justice to take care, for the general good of the community, that hard cases do not make bad law. Upon the

special counts of the declaration, the cause of action disclosed is the refusal to deliver the residue of the salt purchased and paid for. When did this accrue? From that point of time the Statute of Limitations began to run, and when it once began to run nothing could stop it, so that, in six years thereafter, the right of suit was barred. The rule is firmly established, that in assumpsit the breach of contract is the cause of action, and that the statute runs from the time of the breach, even where there is fraud on the part of the defendant. That is laid down in *Battley v. Faulkner*, 3 B. & Al. 288; *Short v. Macarthy*, Id. 626; and *Brown v. Howard*, 2 Br. & B. 73. When the plaintiff tried to obtain the 10,000 maunds of salt, and he was told by the agents of the company that there was no salt in the golahs to deliver to him, the contract was undoubtedly broken, and the cause of action had accrued.

It has been contended that the subsequent negotiations and inquiries suspended the operation of the statute till 1838, when there was a final refusal to make any compensation, or that a new right of action then accrued. But no authority has been or can be cited to support either of these propositions, and we are reluctantly obliged to overrule them both. There might be an agreement that, in consideration of an inquiry into the merits of a disputed claim, advantage should not be taken of the Statute of Limitations in respect of the time employed in the inquiry, and an action might be brought for breach of such an agreement. But if, to an action for the original cause of action, the Statute of Limitations is pleaded, upon which issue is joined, proof being given that the action did clearly accrue more than six years before the commencement of the suit, the defendant, notwithstanding any agreement to inquire, is entitled to the verdict. Peel, C. J., rests the judgment of the Court upon the supposition that there had been no refusal to deliver the salt till the conclusion of the inquiry. Till then there certainly had been no absolute refusal to make compensation, by returning part of the purchase money; but in 1831 and 1832 there had been a refusal to deliver the salt. The controversy then was, whether the salt was in the golahs at the time of the second inundation; but whether it was or not, the contract was equally broken, and neither party contemplated a performance of the contract by any further delivery of the salt. The inquiry was only to decide whether a pecuniary compensation was to be made, and what should be the amount of it. Although the judgment of the Court rested entirely upon the special counts of the declaration, it has been very ingeniously urged at our bar that the plaintiff may recover the price of the 10,000 deficient maunds on the count for money had and received, as the contract may be considered as subsisting till Mr. Barlow's report, and that it was subsequently rescinded. But there appear to us to be insuperable difficulties to be encountered in attempting so to shape the plaintiff's case. There is no stipulation in the original contract for allowing it to be rescinded by either party, either entirely or partially; and the defendants have never agreed to its being in any way rescinded. Then there clearly has not been an entire failure of consideration, for the plaintiff has

The East India Company v. Paul.

received and disposed of nearly 24,000 maunds of salt, delivered to him by the defendants. The contract could not afterwards be rescinded by the plaintiff, and his only remedy was an action for the breach of it, in not delivering the residue of the salt, to which he was entitled. Even if he could proceed as upon the rescinding of the contract, the Statute of Limitations would equally be a bar to the count for money had and received, for he might have brought his action on this count as well in 1832 as in 1839. We have been told, in answer to this objection, that the transactions in the interval amount to an acknowledgment, which will take the case out of the stat. 21 Jac. 1, and that the stat. 9 Geo. 4 does not apply, because this action had been commenced before this statute was made law in India. But there were repeated decisions in Westminster Hall, that it applied to actions pending when it passed, and in India it must have the like operation. Besides, independently of the 9 Geo. 4, no sufficient evidence was offered to take the case out of the stat. 21 Jac. 1, for in none of the correspondence or negotiations did the company ever acknowledge that they were indebted to the plaintiff, or that they were liable to him in any shape.

We are, therefore, of opinion, that the rule for setting aside the verdict and granting a new trial should be made absolute. This is the decision of the Court, and I will, merely as an individual, in the presence of the very respectable parties, throw out a suggestion, that, instead of there being a new trial, it is possible there might be an arrangement between the parties, because the merits seem to be clearly in favor of the plaintiff. When you consider that the salt was weighed out of a large parcel, it is quite certain that the property remained in the company, the sellers; and that, therefore, the action might well be maintained, supposing that the salt was lost by the inundation; and had it not been for the inquiry that took place, there is no doubt that the plaintiff could have brought his action, and would have been entitled to recover. The damages seem to be excessive, because there was no allowance made for golah rent, or for wastage. But I should hope, speaking merely as an individual, (this is no part of the judgment of the Court) — but speaking merely as an individual, I should express the hope, and it would be very gratifying to me if I thought it might reasonably be entertained, that, instead of a new trial, there might be an arrangement which should do justice to both parties. [*Wigram.* — What has fallen from your Lordship will, of course, be communicated.] I may say, that, although we all entirely concur in the judgment which has been delivered, we all came to that opinion with the greatest reluctance, and that it would be very satisfactory, I believe, to every member of the Court, if such an arrangement as I have suggested could be made; but we do not take upon ourselves to offer to give any recommendation upon the subject.

The JUDGE OF THE ADMIRALTY COURT. We all concur in the opinion which has been now expressed by Lord Campbell.

CASES

ARGUED AND DETERMINED

IN THE

COURTS OF CHANCERY,

COMMENCING WITH MICH. TERM, 14 VICTORIA, 1850.

In re THE LONDON AND BIRMINGHAM RAILWAY COMPANY'S ACT,
(1833,) AND

In re THE LONDON AND NORTH-WESTERN RAILWAY COMPANY'S
ACT, (1846,) *ex parte* ETON COLLEGE.¹

November 4, 1850.

Railway — Costs of an intermediate Investment — Railway Company's Acts, Construction of.

The L. & B. Railway Company, under their act, (1833,) purchased land of Eton College, and in May, 1846, paid the purchase money into court. That act authorized the intermediate investment of such money in the funds, but was silent as to the costs of such investment. By the 8 & 9 Vict. c. cciv., the L. & B. Railway Company, and certain other companies, were consolidated and incorporated together under the style of the L. & N. W. Railway Company. By the first section, the existing acts of the several companies were repealed, and the companies dissolved; with a proviso that such repeal should not annul any purchase, &c., made thereunder; and by section 10, where any sum of money had been paid into the Bank on account of the purchase of land by any of the dissolved companies, the same was to be disposed of pursuant to the act under which it had been paid in; and all the provisions of the repealed act, in relation thereto, were, for the purposes of this act, to remain in full force, &c.; and by section 11, the Lands Clauses Consolidation Act, 1845, was incorporated with this act. The 80th section of the Lands Clauses Consolidation Act, 1845, provided, that in the case of moneys paid into the Bank, under that or the special act, (the word "special" being interpreted by sect. 2 as an act to be afterwards passed,) the costs of and incident to an intermediate investment in the funds should be borne by the company. Upon the petition of Eton College in 1849 for an investment of the purchase money in the funds, it was held, that the L. & N. W. Railway Company were liable to pay to the petitioners the costs of such intermediate investment in the terms of the 80th section of the Lands Clauses Consolidation Act, 1845.

Where the words of a railway company's act are capable of two interpretations, but the general intent of the legislature is complete indemnification to the party whose land is taken by the company, the court will incline to that construction of the words which will make them consistent with the general intent.

By the 3 & 4 Will. 4, c. xxxvi., "The London and Birmingham Railway Company" was incorporated for the purpose of making a railway from London to Birmingham. That act, after empowering the company to purchase and hold lands for the purpose of the undertaking, enacted, that if any money should be agreed or awarded to be paid for the purchase of any lands to be taken, which any corporation, or other incapacitated person, should be entitled unto or interested in, such money should, in case the same should amount to

¹ 20 Law J. Rep. (n. s.) Chanc. 1. 15 Jur. 45.

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or exceed the sum of 200*l.*, be paid into the Bank of England in the name and with the privity of the Accountant General, &c., and should, when so paid in, there remain until the same should by order of the court, made in a summary way upon petition, be applied either in the purchase or redemption of the land tax, or in or towards the discharge of any debt or other incumbrance affecting the said lands, or affecting other lands standing settled therewith, to the same or the like uses, trusts, intents or purposes, or until the same should, upon the like application, be laid out by order of the said court, made in a summary way, in the purchase of other lands to be settled to the like uses; and in the mean time and until such purchase could be made, the said money might by order of the said Court, upon application thereto, be invested by the said Accountant General in his name in the purchase of 3*l.* per cent. consolidated or 3*l.* per cent. reduced bank annuities, or in other government or in other real securities. And it was thereby further enacted, that where by reason of any disability or incapacity of any party entitled to any lands to be taken under the authority of that act, the purchase money for the same should be required to be paid into the Bank of England to be applied in the purchase of other lands to be settled to the like uses, it should be lawful for the said Court to order the expenses of all such purchases, or so much of such expenses as the Court should deem reasonable, together with the necessary costs and charges of obtaining such order, to be paid by the said company; and the said company should from time to time pay such sums of money for such purposes as the said Court should direct.

By the 80th section of the Lands Clauses Consolidation Act, 1845, (8 Vict. c. 18,) it was enacted, that in all cases of moneys deposited in the bank under the provisions of that or the special act, or an act incorporated therewith, (except as therein excepted,) it should be lawful for the Court of Chancery to order the costs of the following matters, including therein all reasonable charges and expenses incident thereto, to be paid by the promoters of the undertaking; that is to say, the costs of the purchase or taking of the lands, or which should have been incurred in consequence thereof, other than such costs as were therein otherwise provided for, and the costs of the investment of such moneys in government or real securities, and of the reinvestment thereof in the purchase of other lands, and also the costs of obtaining the proper orders for any of the purposes aforesaid, and of the orders for the payment of the dividends and interest of the securities upon which such moneys should be invested, and for the payment out of court of the principal of such moneys, or of the securities whereon the same should be invested, and of all proceedings relating thereto, except, such as were occasioned by litigation between adverse claimants.

A portion of the estate of Eton College being required for the purposes of the London and Birmingham Railway Company, the company contracted with the College for the purchase of the same at the sum of 950*l.*, which sum was paid into the Bank of England on the 23d of May, 1846, in the name and with the privity of the Accountant

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General, "ex parte the London and Birmingham Railway Company;" and in 1847 the lands so taken were conveyed by the College to the company.

By the 9 & 10 Vict. c. cciv., (1846,) intituled "An act to consolidate the London and Birmingham, Grand Junction, and Manchester and Birmingham Railway Companies," it was enacted, 1. "That from and immediately after the passing of this act the said several hereinbefore recited acts relating to the London and Birmingham, the Grand Junction, and the Manchester and Birmingham Railways respectively shall be and the same are hereby repealed, and the several companies by the same acts, or any of them incorporated, shall be and the same are hereby dissolved: Provided nevertheless, that the repealing of the said acts shall not revive any acts or provisions of any acts by the said recited acts repealed, and shall not annul or in any wise prejudice or affect any purchase, sale, conveyance, grant, contract, security, act, matter, or thing whatsoever heretofore made, done, committed, or executed under or by virtue or in pursuance of the said repealed acts, or any of them, but all such purchases, sales, conveyances, grants, contracts, securities, acts, matters, and things shall be, and the same are hereby declared to be, as good, valid, and effectual to all intents and purposes whatsoever, as if the said acts had not been repealed: provided also, that except as is herein otherwise specially provided, or except so far as the same may be repugnant to the provisions of this act, nothing herein contained shall extend in any way to defeat, affect, or prejudice any rights, privileges, liberties, powers, easements, accommodations, or exemptions, which under or by virtue of the said recited acts, or any of them, are given, granted, continued, or reserved to or for the benefit of any persons or corporations whose estates, properties, or interests are, have been, or may be in any wise affected in or by the making or maintaining or otherwise on account of the railways, branches, and works by the same acts respectively authorized to be made and maintained, or to which such persons or corporations are or may be, or but for the repeal of the said recited acts would have been otherwise entitled; but all such rights, privileges, liberties, powers, easements, accommodations, and exemptions shall be and they are hereby declared to be as valid and effectual as if the said recited acts had not been repealed, and such several persons and corporations shall be entitled to and shall have, use, and enjoy the same rights, &c., or such and so many of them as immediately before the passing of this act they were entitled, or as but for the passing of this act they would hereafter have been entitled to have, use, and enjoy, as fully and effectually as if the said acts had not been repealed, and shall and may have and be entitled to such or the like powers and remedies upon and against the said company hereby incorporated for securing the possession, use, and enjoyment of such rights, &c., as under the provisions of the said recited acts they had, or were, or would, or might have been entitled to against the said dissolved companies, or any of them, in case the said recited acts had not been repealed; and all such penalties, damages, moneys, costs, and expenses as under the provisions of the said recited acts, or any of them, would or hereafter might have

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become payable to or recoverable by such persons and corporations as aforesaid of and from the said dissolved companies, or any of them, in case the same acts had not been repealed, shall and may be payable by and recoverable from the said company hereby incorporated, in such manner and by such ways and means as the same are respectively made payable and recoverable under the provisions of the said recited acts respectively."

2. "That the Companies Clauses Consolidation Act shall, so far as the same is applicable, and is not modified by this act or inconsistent with the provisions thereof, be held to apply to the company hereby incorporated, and shall be read and construed as forming part of this act; and the Railways Clauses Consolidation Act, 1845, shall, so far as the same is applicable and is not modified by this act, or inconsistent with the provisions thereof, be held to apply to the company hereby incorporated, and the railways and works by this act vested in and authorized to be made by the company hereby incorporated, and shall be read and construed as forming part of this act, to all intents and purposes, as if the said railways and works made under the powers and provisions of the said acts hereby respectively repealed had been made under the powers and provisions of the said Railways Clauses Consolidation Act, 1845, instead of the said repealed acts, and as if the said Railways Clauses Consolidation Act, 1845, had been expressly made applicable and had been applied to or authorized to be applied to the railways existing at the time of the passing of the same act, as well as to railways which should by any act which should be passed after the passing of the said Railways Clauses Consolidation Act, 1845, be authorized to be constructed, and as if the said existing railways hereby vested in the company hereby incorporated, and hereby expressly or by reference authorized to be constructed, had been expressly or by reference authorized to be made and constructed under the powers and provisions of this act."

By the 3d section it was provided that the said recited companies should be together incorporated by the name of the London and North-Western Railway Company.

9. "That in all cases in which any of the said dissolved companies previously to the passing of this act, under the powers or provisions of any of the acts hereby repealed or any other acts, have entered into any contract for the purchase of, or shall have taken or used any land which at the time of the passing of this act shall not be effectually conveyed to such company, or the purchase money in respect of which shall not have been duly paid by such company, then and in every such case such contract shall be completed and such land shall be conveyed to the company hereby incorporated, or as such company shall direct; and such purchase money shall be paid and applied, pursuant to the act or acts under which such contract shall have been made or such land shall have been taken or used; and all the clauses, provisions, powers, and authorities contained in such act or acts in relation to the completion of such contract, and the purchase and conveyance of such land, and the payment and application of the purchase money in respect thereof, shall for the purposes of this act remain in full force, and shall be construed

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and taken as if the company hereby incorporated were named in such act or acts and contract respectively, instead of the company which shall have entered into such contract or taken or used such land."

10. "That in all cases in which under the provisions of any of the acts hereby repealed or any acts repealed by such lastly-mentioned acts, or any other acts, any sum of money has already been paid by any of the said dissolved companies, or by any company incorporated with such companies, or any of them, or shall hereafter be paid by them or any of them, or the company hereby incorporated, into the Bank of England, to any trustee or trustees on account of the purchase of any land or any interest therein, or for any compensation or satisfaction or on any other account, such sum or the stocks, funds, or securities in or upon which the same has been or shall be invested either by the order of the Court of Exchequer or the Court of Chancery or otherwise howsoever, and the interest, dividends, and annual produce thereof shall be applied and disposed of pursuant to the act or acts under which the same has been or shall be so paid into the Bank of England or to such trustee or trustees as aforesaid; and all the clauses, provisions, powers, and authorities contained in such act or acts in relation to such moneys, stocks, funds, and securities, and the dividends and annual produce thereof shall for the purposes of this act remain in full force, and shall be construed and taken as if the company hereby incorporated were named in each such act instead of the company to which such act relates."

11. "That subject to the provisions hereinbefore contained, the Lands Clauses Consolidation Act, 1845, shall be incorporated with this act."

In November, 1849, the Provost and College of Eton presented their petition in the matter of the London and Birmingham Railway Company's Act, 1833, and in the matter of the London and North-Western Railway Company's Act, 1846, praying that the said sum of 950*l.* might be laid out in the purchase of 3*l.* per cent. consolidated or reduced annuities, in the name and with the privity of the Accountant General, to an account entitled, "The account of the Provost and College of Eton," and that the dividends thenceforth accruing might be paid to the petitioners; and that it might be referred to the Taxing Master to tax the costs, charges, and expenses of the petitioners of and attending the investment of the said sum in the said government securities, and for the payment of the dividends thereof, and of such government securities, together with the necessary costs and charges of obtaining the proper orders for such purposes, and that such costs, charges, and expenses, when taxed, might be paid by the said London and North-Western Railway Company to the petitioners.

The Vice Chancellor of England made the order as to costs in conformity with the prayer of the petition. The London and North-Western Railway Company appealed from so much of that order as related to the payment of costs.

Mr. Rolt and *Mr. Speed*, for the appellants. The land in question was taken under the powers of the London and Birmingham Railway Act, 1833; which does not provide for the costs of intermediate in-

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vestment of the purchase money. By the 10th section of the London and North-Western Railway Company's Act it is provided, that where any purchase money shall have been paid into the Bank of England, under the provisions of any of the acts thereby repealed, such sum shall be applied and disposed of pursuant to the act under which the same shall have been paid in, and all the clauses, provisions, &c., contained in such act in relation to such moneys, shall for the purposes of this act remain in full force, &c. The costs, therefore, of this investment must be regulated by the London and Birmingham Railway Act. The Court has no jurisdiction to order payment of the costs, except they are expressly provided for by the act—*In re Isaac*, 4 Myl. & Cr. 11; *Ex parte Taylor*, 1 Y. & Coll. Exch. 229; s. c. 4 Law J. Rep. (n.s.) Ex. Eq. 33; *Ex parte Cooke*, 7 Jurist, 639; *Ex parte Molyneux*, 2 Col. 273; *Ex parte Langton*, 11 Jurist, 686. The 11th section of the London and North-Western Railway Company's Act applies to contracts made after the passing of that act; and the 80th section of the Lands Clauses Consolidation Act, 1845, applies only to moneys deposited in the Bank under this or the special act; which words, "special act," by the interpretation clause, (sect. 2,) mean acts hereafter to be passed.

Mr. Stuart, for the respondents. The 9th and 10th sections of the London and North-Western Railway Company's act are provisions for sale and purchase of lands, and do not relate to the question of costs, which must be regulated by the 80th section of the Lands Clauses Consolidation Act, incorporated into the London and North-Western Railway Company's Act.

Mr. Rolt replied.

THE LORD CHANCELLOR. Applying my mind as far as I am able to this question, I own that it does not appear to me to be susceptible of any very serious doubt. I have been anxious to hear what might be said on both sides, understanding that the effect of the decision pronounced in this case would be to govern numerous other cases, and that therefore it was fit that I should be possessed of all the information which the bar could afford me before I pronounced a decision. I own that the effect of the argument has not produced any serious doubt in my mind as to what should be the decision.

It is to be observed that the circumstances out of which this question arises are that of a compulsory purchase, in part for the benefit of the public, and in part for the benefit of private speculators, who rendered that benefit for the public on certain terms. What must be supposed would be reasonably done by the legislature on such an occasion, where it had to deal not only with property possessed by persons in their own right, and for their own benefit exclusively, but also with trust property, settled property, and property of charities? One may reasonably suppose, if one had to speculate on what Parliament would do, instead of what they have done, that they would place the owner of the property—the *cestuis que trust*—the charity—in precisely the same situation, as far as it could be done, in point of bene-

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fit, as if the property had not been interfered with under the statute. It is not fit either that persons individually interested in property, or *cestuis que trust*, or charities, should pay any portion of the costs, or that they should sustain any loss by the carrying into effect objects of public benefit; they would not benefit exclusively, the public generally would benefit; and they, in common with the public, would, by whatever means the costs were provided for, sustain their portion without having any special portion cast on them by the act.

The act of Parliament dealt with land. Consequently, the attention of the legislature was directed to the power that would be necessary to be possessed by the company to take the land, and the clauses that would be necessary to secure the rights of parties interested in the land so to be taken; and accordingly it appears that in this act, by section 42, it professes to provide for the application of the purchase money, and it places parties whose land was to be taken by the company in the same situation in point of benefit and advantage as they would have been in if their rights had not been disturbed, and therefore provides, in certain cases, that the money shall be applied in the repurchase of land; and it directs that the expense of such repurchase, or such part as the Court should think reasonable, together with the costs of obtaining the order, shall be paid by the company. I shall not offer any opinion with respect to the construction of that clause, as the decision of this case is admitted not to depend on the construction of that clause. It has already received its construction; and it is unnecessary to consider whether that construction was or was not right, or whether it has or has not gone to such an extent as that it ought to bind; agreeing with the observation that when an act of Parliament has come under the consideration of competent jurisdictions, and has received a uniform construction, it would be dangerous, and it would require a very strong case indeed in order to induce any other tribunal before which it may come, to act inconsistently with those previous decisions and that acquiescence in them. However, all that I refer to that clause for now is, that I find that the legislature, from the outset, as far as the company were concerned, intended that at least so much as would be reasonably included in the expense attending the reinvestment of the purchase money of land taken in the purchase of land was to be sustained by the company. It seems to me that the general intent of the legislature corresponds with what I should have supposed would have been intended, and that the words have relation to the purchase of land, which alone could be necessary for the purpose of the act. But it appears that by a subsequent act this company, so far as keeping them in existence as a company is concerned, was dissolved. They had no right to become proprietors of land afterwards; nor could any trustees of any charity be authorized to convey any land to them after the company were dissolved and the act repealed. A new authority must arise to justify such a proceeding; and as might have been expected, inasmuch as the object of the 9 & 10 Vict. c. cciv. was to carry into effect the original objects of 3 & 4 Will. 4, c. xxxvi., in combination with other objects, it adopted certain things that had been done under the authority of the 3 & 4

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Will. 4, c. xxxvi., and created a new authority for a new company to take the benefit of what had so been done, and giving to other parties such a benefit as could arise to them under contracts made with that first company. But intermediately it appears that it had been found that from the extent to which railways had been adopted, and the extent to which the interests of individuals and the public were embarked, the wisdom and propriety and justice of the provisions contained in the acts of individual companies, were thought right to be reconsidered; and the effect of that reconsideration was, that the legislature passed an act, enacting that certain general clauses should form part of and govern the execution of any future railway acts to be thereafter passed; that is, generally called the Lands Clauses Consolidation Act.

It appears in the present case that the company had contracted with Eton College for the purchase of a certain portion of land. I have no means of knowing, and therefore I have no ground from which I can draw any inference as to the mode in which that purchase money was computed. I must presume it was computed with reference to the value of the land simply; therefore I take the case to be that of a contract for the purchase of land, the price or compensation for which had been adjusted in some proper mode between the London and North-Western Railway Company and Eton College either by a compulsory sale or by an arbitration in the manner pointed out by the act of Parliament, or by an agreement made in a manner which the law would authorize. This contract existing therefore prior to the year 1846, it appears that the purchase money had been paid into court, under the authority of the previous act, but that this was purchase money which, though paid into court, was in the course of being applied in the repurchase of land; it was in transit for that purpose; and being in that situation, the Lands Clauses Consolidation Act passed, which looked to the possibility of some of the old concerns undergoing changes in the course of its prosecution, and provided that where any new act should pass which consolidated any of the previous acts, in that case, inasmuch as the parties had come to Parliament for further power, as it must be supposed the legislature said, "We think that if any such companies do come for the purpose of incorporating old undertakings and old acts of Parliament with a new act giving further powers, in that case the result of the subsequent reconsideration of such clauses as are necessary to do justice between the parties shall govern and rule the conduct and prosecution of the concern under any such new act of Parliament." That being the effect of the Lands Clauses Consolidation Act, we then come to the act of Parliament under which the company at present exist, the London and North-Western Railway Company's Act, and find accordingly that the first section of that act repeals all the previous acts under which the London and Birmingham Railway Company had been established, and had been acting; and there were several; but at the same time, although it repeals the former acts, it establishes whatever had been perfected and done as between that company and individuals, and it also provides that

all benefits, privileges, rights, easements, accommodations, and exemptions which individuals had acquired under that act, shall be preserved and continued to such individuals. It must be supposed that the individuals mentioned had been individuals who purchased those privileges, rights, and easements, and so on, by some transaction with the company, giving them an equivalent benefit to that which was reserved to them; and the act is very minute in preserving all such rights, and it also preserves the rights of owners of mines under land of which the railway company had before become purchasers. It then enacts in general terms that the Companies Clauses Consolidation Act shall be deemed a part of this act; and having so done, it proceeds to establish a new company; and it is that new company with which we now have to deal; the new company composed in part of a different body altogether: and it then enacts that after the passing of this act, the London and Birmingham, Grand Junction, and Manchester and Birmingham Railways, and all other railways and branches thereof which were vested in any of the dissolved companies, and the benefit of all contracts, and so on, shall be vested in the new company. Now, the next material section in this act for the present purpose is the 9th section, which deals with executed contracts.—[His Lordship here read the 9th section.]—Now this relates to the purchase of land, and it enacts that the contract shall be completed, and that the purchase money shall be applied according to the provisions of the act under which the contract had been made.

Now, what ought I to understand as included in the words "in relation to the completion of such contract, and the purchase and conveyance of such land," and so on? Undoubtedly I should be disposed to understand and to construe those words as relating to the general execution and completion of the contract, and the purchase of land, in order to avoid the time and trouble and the uselessness of repeating clauses which originally were intended to govern those transactions, and which it would be sufficient to refer to in such general terms.

Now, under such circumstances, the question is, whether I am to understand that this 42d section is to be considered as so overriding the 9th section as that not only it is to be taken to limit the application of the costs in its express terms to what should be incurred in relation to the purchase, but also as negatively excluding all power under the new act, by reason of its incorporation here, from giving any costs which could not have been given under that section. It has been very properly said that the 10th section is more applicable to the present question as it applies to the case of money which has been paid into the Bank by the company. Now, has this 10th section any further effect than to direct that the purchase money shall be applied according to the manner in which it would have been if the act had not been passed? There is nothing in its application which interferes with that; the money will be applied according to the manner in which it would have been if this act had not passed, unless this act in some mode expressly controls it.

Then comes immediately in connection with the 9th section, which deals with the completion of the purchase of land, the 10th section,

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which deals with the application of money that cannot be immediately reinvested.

Now, first of all, we must look to see what there is to be found in that act which would affect this case, supposing the particular part of that act is incorporated in this. Why, it is admitted that the 80th section of the Lands Clauses Consolidation Act, 1845, gives to parties interested in land in a similar manner as Eton College is, the costs in all such cases to which it applies.

The question is, whether that portion of the act, therefore, is to be brought into the present case; and if so, its effect is not disputed.

Now, that section is to override all future acts of Parliament, and all by-gone acts incorporated in future acts of Parliament. Now, to what extent am I to suppose that those words are to be understood as acts incorporated? Here the London and Birmingham Railway Company propose to make a given railway, and there are certain clauses in that act of Parliament calculated to effect that object; the London and Birmingham Railway Company propose not to abandon their original object, but to carry it into effect, and to engraft upon it other extensive works, and other and new branch railways. There is, therefore, no abandonment of the original act, and that original act is incorporated in this act to a certain extent by the provision contained in the 1st section, which states that all the rights, easements, accommodations, and so on, which I have before read, which persons have acquired under these acts, shall be considered as still in force; and the 9th and 10th sections enact, that all the provisions which relate to the execution of the contracts and to the application of the purchase money, and the various other objects which I have just read in the 9th and 10th sections, are also to govern the execution of antecedent contracts. I cannot but suppose, that under the words "incorporated in that act" I must understand that where the new act, the special act, is intended to carry into effect some antecedent project, and where the clauses incidental to that project are brought over and directed to be acted on in the execution of such new project, it seems to me that those words necessarily satisfy the words which provide that the section shall apply to any new act, or to any act incorporated in such new act; and I consider the London and Birmingham Railway Act for the purpose of this question as embraced by those words, and, as bearing on the present question, incorporated by that act.

Now, it being admitted that the 80th section will give the costs on the present occasion, if it applies to the case at all, I conceive that it does apply to the case, and that that is accomplished which the legislature had intended originally, viz., to indemnify parties whose property was taken, and to place whoever were interested in the property taken in the situation of obtaining a benefit equal to that which they would have enjoyed if their rights had not been disturbed. I think that the construction which the Vice Chancellor put on the act was right, and without at all questioning or entering into it, or forming any opinion as to the propriety of the construction of the 42d section in the antecedent act. I think that the proper construction of this act is, that the Lands Clauses Consolidation Act, so far as it

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applies to the costs, with certain other parts which are not material, is incorporated in this act, and that not only the words but that the fair meaning and substance of the act imply that this money is in the course of transit only for the purpose of being applied to the reinvestment in land, and that it is quite plain that the legislature, after having under its review the former acts, and those who prepared the acts having under their review the former decisions, deliberately determined that no future act should be executed but on the terms of those parties paying these costs. Now, it has often been said, that these acts of Parliament are to be considered as bargains between the railway companies and the public. It will be remembered that it was the railway company who prepared those acts of Parliament. It is quite true that any body who is opposed to them in interest may come in and be heard; but that is an expensive operation; many persons interested are incompetent to judge how far their interests are affected, and it has been so repeatedly held that it has become an axiom, that where the acts of Parliament leave some doubt as to any matter between the public and the company, the inclination ought to be rather to give such construction to the act as is consistent with the justice of the case, if the words will bear them, and rather to put a construction adverse to the company than in their favor, inasmuch as they are the persons who have the preparation of the act, and have the best means of protecting themselves.

Now, I remember in Blackstone's argument on "Collateral Consanguinity," the course suggested by that argument is, that you are to look to the intent of words, and if you find that the words introduce something that is inconsistent with the intent, and if it is proper to give another construction that is more consistent with the intent than the construction which is contended for from the precise words, you should pay great attention to the intent.

I conceive that the intention of the legislature, which is distinctly marked by the act of Parliament, was to indemnify parties whose land should be taken. I think that the words admit of such a construction, and that it is the soundest construction which will give effect to the intention of the legislature. I therefore think that this appeal must be dismissed, with costs.

In re THE INDIA AND AUSTRALIA MAIL STEAM-PACKET COMPANY,
ex parte MAUDSLAY.¹

November 8, 14, 1850.

Company — Winding-up Acts — Shareholders not liable as Contributories.

The Master placed on the list of contributories a person who had accepted shares and paid the deposit upon them, but had not belonged to the provisional committee. The company never came actually into existence, owing to the requisite amount of capital not

¹ 20 Law J. Rep. (n. s.) Chanc. 9. 14 Jur. 1012.

Maudslay, Ex parte.

having been paid up. The Master's decision was reversed, upon the ground that persons, by taking shares in such a company, did not render themselves liable for any expenses incurred without their sanction.

THIS was a motion, on behalf of Messrs. Maudslay & Field, engineers, that the report of the Master charged with the winding up of the India and Australia Mail Steam-Packet Company, whereby the master had declared and adjudged that the said Messrs. Maudslay & Field were contributories to the company in respect of 1000 shares, and that they should be retained on the list of contributories accordingly, might be discharged.

The facts relating to this case were as follows: That in 1846 the above company was projected, and in the course of the same year the company was provisionally registered, and the charter passed the Great Seal on the 6th of August, 1847. On the 10th of August, 1847, Messrs. Maudslay & Field applied for 1000 shares in the company, by filling in an application at the foot of one of the prospectuses, which was in these words: "Gentlemen: We request that you will allot us 1000 shares, of 20*l.* each, in the above undertaking, upon which we engage to pay the preliminary deposit of 5*s.* per share; and we agree to accept the same or any less number that may be allotted to us, and to sign the deed of settlement when required." The following letter also accompanied the application for shares, addressed to the secretary: "Sir: Referring to the conversation Mr. Field had with you some days since, and also to the explanation you gave our chief clerk, Mr. Fitzpatrick, on Saturday, relative to the arrangement that would be made with us in the event of our taking an interest in the proposed company, we beg to hand you herewith an engagement to take 1000 shares, and in the event of your maturing your plans with the Government, we take it for granted that your directors will carry out the views you expressed to Mr. Fitzpatrick, to the effect that we shall receive a due share of your orders, and also be at liberty to reduce the number of shares now subscribed for."

On the 14th of August, Messrs. Maudslay & Field received a letter from the secretary of the company, informing them that the 1000 shares, upon which they had paid the deposits, had been allotted to them on the terms alluded to in their letter; and on the 4th of August, 1848, the secretary to the company addressed another letter to Messrs. Maudslay & Field, informing them that the plans of the company had been so far effected as to justify the directors in proceeding to carry out their object most energetically, and concluding in these words: "I should therefore be glad if you will, at your earliest convenience, favor me with a call, to arrange the number of shares you will hold, and to discuss other preliminary matters preparatory to the actual commencement of business."

At a meeting of the directors of the company subsequently held, it was, amongst other things, resolved, that the directors should be authorized to appoint Messrs. Maudslay & Co., and two other firms, to be engineers to the company, on each of the said firms subscribing for and agreeing to hold 500 shares at least in the capital stock of the company, paying the first instalment of 1*l.* per share, and

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subscribing the deed of settlement. In pursuance of this resolution, Messrs. Maudslay & Field agreed to take 500 shares, and to pay thereon a deposit of 1*l.* per share.

In compliance with the terms of the charter, a deed of settlement was prepared in December, 1847, and soon afterwards was signed by twenty shareholders, but was not signed by Messrs. Maudslay & Field.

The company then proceeded to treat with Government for the conveyance of the mails, but after a long negotiation they failed in their object; and in January, 1849, a meeting of the shareholders was held, at which it was resolved, that the existing liabilities of the company should be paid, and the affairs wound up; and an order was obtained on the 4th of May, 1849, for winding up the company, under the provisions of the Winding-up Act.

By the charter of incorporation it was provided that, when fully established, the capital of the company was to be 1,000,000*l.*, consisting of shareholders holding in the aggregate 50,000 shares, of 20*l.* each, but that when 12,500 shares, or one fourth of the capital, should have been so subscribed for, and one eighth of the capital had been paid up, they should be at liberty to begin business.

The number of shares applied for amounted to 12,653, being 153 over the number required by the charter to be subscribed for before beginning business, but the minimum amount required to be paid up had not been so paid.

Mr. Bethell and *Mr. Daniel* appeared in support of the motion, to reverse the master's decision, and cited the case of *Ex parte Upfill*, 14 Jurist, 843, decided by the House of Lords on the 9th of August, 1850. In that case, *Mr. Upfill* was chosen a member of the general committee of the Direct Birmingham, Oxford, Reading and Brighton Railway Company; but he had never signed any consent to act, or had interfered in any manner in the affairs of the company. The secretary of the company wrote to inform him that the managing committee had allotted him 100 shares, as a member of the provisional committee, and requested to know whether he would take that or any less number. *Mr. Upfill* wrote in reply, stating he would accept 100 shares so allotted. The letter of allotment was headed "Not transferable," and stated that the allotment would be "null and void," unless the deposit was paid by a certain day. *Mr. Upfill* did not pay the deposits, nor did he take any further notice of the allotment. Their Lordships were of opinion that *Mr. Upfill* was a member of the provisional committee, who had agreed to accept shares, and that the words "not transferable" only applied to the letter of allotment, not to the shares, and that the words "null and void" could only be taken advantage of by the directors. It was contended that, as this company had never actually come into existence by reason of the amount of capital required by the charter not having been paid up, and as Messrs. Maudslay & Field had never become provisional committee-men, they were not liable as contributors to the company. The case of *Ex parte Cottle*, 2 Hall & Twells, 382; s. c. 19 Law. J. Rep. (N. S.) Chanc. 366, was also cited.

Carmichael, *Ex parte*.

shares. Lord Brougham expressly stated, in giving his judgment, that he decided that case, not on the ground that Uphill was a provisional committee-man, nor on the ground that he had accepted shares, but on those two facts taken in union with each other. I presume the principle of that decision is, that when a provisional committee-man accepts shares in that character, he must thereby be taken to have given authority to the other members of the committee to incur expenses on his account in forming the company.

I confess I have great difficulty in understanding the principle, but, of course, I bow to the authority, and shall be guided by it in cases where the facts are similar. Here, however, there is a clear distinction, for Maudslay & Field were not provisional committee-men, and took no part in forming the company, except so far as they may be considered to have done so by agreeing to take shares; so that one of the ingredients held by Lord Brougham in *Uphill's Case*, in order to create liability, is wanting.

I have decided this case on general grounds, which make it unnecessary for me to inquire how far Mr. Bethell is right in his argument, that, in fact, there never was any acceptance of shares at all; or, if there was, then that such acceptance was afterwards abandoned by consent. The names of Messrs. Maudslay & Field must be removed from the list, and the costs of all parties will come out of the funds.

In re THE IRISH WEST COAST RAILWAY COMPANY, *ex parte* CARMICHAEL.¹

• November 11, 14, 1850.

Company — Winding-up Acts — Provisional Committee-man not liable as Contributory.

The Master placed Mr. Carmichael on the list of contributories to this company, as a provisional committee-man, and as an allottee of 100 shares:—

Held, that the evidence was not sufficient to show that Mr. Carmichael had bound himself to take any shares, and that he, being only in the position of a provisional committee-man, who had not authorized any expenditure on his behalf, his name must be expunged from the list of contributories.

THIS was a motion on behalf of John Carmichael, an alleged contributory of the Irish West Coast Railway Company, that the decision of the Master charged with the winding up of the said company, whereby he included the said John Carmichael in the list of contributories as a provisional committee-man and as an allottee of 100 shares, might be reversed, and that the name of the said John Carmichael might be excluded from the said list of contributories.

The evidence upon which the Master came to the above conclu-

¹ 20 Law J. Rep. (N. S.) Chanc. 12. 14 Jur. 1014.

Carmichael, Ex parte.

sion was as follows: That on the 1st of August, 1845, the said John Carmichael addressed the following letter to the provisional committee of the Irish West Coast Railway Company:—

“Gentlemen: I request that you will allot me 100 shares of 25*l.* each in the above undertaking, and I agree to accept such shares as may be allotted to me, and to pay the deposit of 2*l.* 12*s.* 6*d.* each thereon, and also to sign the parliamentary contract and the subscribers’ agreement when required.”

That on the 11th of August, the said John Carmichael addressed a letter to the solicitors for the company to the following effect:—

“Gentlemen: Your favor of the 31st of July was duly received in my absence; therefore I could not reply till to-day. With regard to the Irish West Coast Railway, I am of opinion that it will be a good line, and have no objection that my name should be used as one of the provisional committee, and if you send me the printed form of application I will fill it up, taking fifty or more.”

That on the 16th of October, 1845, the said John Carmichael signed the following document, agreeing to act as a provisional committee-man, and to take shares:—

“We, the undersigned promoters of the provisionally registered Irish West Coast Railway Company, do, and each of us doth hereby declare his consent to be provisional committee or directors of the said company, and each of us doth hereby separately for himself agree with Peter Campbell and Thomas Forester, as trustees for the said company, to take one or more share or shares in the said proposed undertaking, upon such share or shares being allotted to him according to the provisions of the said company.”

A book belonging to the company was also produced to the Master, containing an entry of 100 shares being applied for and allotted to John Carmichael; and another book containing a list of applications for shares, and an entry therein of an application for fifty shares by John Carmichael.

Mr. Rolt and *Mr. Surridge* appeared in support of the motion for reversing the Master’s decision, and contended that there was no evidence to show that Mr. Carmichael had ever accepted any shares, and that he was not a member of the provisional committee on the 11th of August, the time when he applied for shares. There was evidently a discrepancy upon the subject, even upon the books of the company, and also as to the dates of the application for shares. The first applications were made merely for the purpose of complying with the provisions of the Joint-Stock Companies Act; but there was no proof of any shares having been actually allotted. When Mr. Carmichael signed the agreement to become a provisional committee-man, he consented thereby to take one or more shares, but there was no subsequent allotment to him.

Mr. Bethell and *Mr. Bell*, contra, urged that the Master was right in his decision, and that Mr. Carmichael ought to be placed on the list of contributories. It was evident that he had taken some shares,

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if not so many as 100. It was reasonable to suppose that, when he signed the agreement to be on the provisional committee, and to take one or more shares in the company, this had reference to the number he had already applied for; that, at any rate, there was an agreement to take shares and to be on the provisional committee, which was sufficient to bring the case within the decision in *Upfill's Case*.

November 14. **ROLFE, V. C.** In this case, the evidence on which the Master has placed the name of Mr. Carmichael on the list of contributories is as follows: First, there was a letter of application from Mr. Carmichael to the provisional committee, dated the 1st of August, 1845, in which he requested them to allot to him 100 shares. It was not shown that any thing was done in consequence of that application. Secondly, a letter from Mr. Carmichael to Messrs. Reed & Robinson, of the 11th of August, 1845, in which he expresses his approbation of the proposed line, and consents that his name should be put on the provisional committee, and he adds, "If you will send me the printed form of application, I will fill it up, taking fifty or more." Who Messrs. Reed & Robinson were, does not appear; but I assume that they were persons acting for the promoters of the scheme. There is no evidence of any thing having been done till the 9th of October, on which day Mr. Carmichael signed and remitted to London a proper consent to have his name placed on the books at the Stamp Office, as a provisional committee-man. Upon the 17th of October, the secretary of the society wrote to Mr. Carmichael, informing him that the committee of management had placed at his disposal 100 shares, and desiring him to send in an application for the number he should wish to take up. This is all the evidence, except that the company in one of their books entered the name of Mr. Carmichael as an applicant for 50 shares, and in another entered his name for 100 shares, as having been allotted to him; but this was of course all done behind his back, and cannot affect him.

I think it clear on this state of facts, that neither the promoters of the scheme on the one hand, nor Mr. Carmichael on the other, considered that any definite agreement had been come to for taking shares at all. Mr. Carmichael originally applied for 100 shares, but it does not appear that any thing was done on that application; and ten days afterwards he writes again, intimating his desire to take 50 or more, which is inconsistent with the notion that he was at that time an applicant for 100 shares. All such applications are made on an implied condition that they shall be answered promptly, or otherwise that the party applying shall not be bound by his application; and that this was so understood by the company is apparent from the tenor of the secretary's letter of the 17th of October, in which, though he informs Mr. Carmichael that 100 shares had been allotted to him, yet he couples that with an inquiry how many he intends to take. I am of opinion that, on this evidence, there is nothing to show that Mr. Carmichael had ever bound himself to take any shares at all. This, therefore, clearly distinguishes the present

Clarke, *Ex parte*.

from *Upfill's Case*. Upfill had clearly in terms accepted his shares, and the judgment of Lord Brougham proceeds mainly on that circumstance. Mr. Carmichael, therefore, is merely a provisional committee-man, not having accepted shares nor in any manner authorized expenditure on his behalf. This case, therefore, is indistinguishable in principle from *Cottle's Case*, 2 Hall & Twells, 382; s. c. 19 Law J. Rep. (N. S.) Chanc. 366, and so the Master was wrong in placing his name on the list. It must, therefore, be removed.

Mr. Bethell then called the attention of the Court to the circumstance that in Mr. Carmichael's agreement to have his name registered as a provisional committee-man, the document continued thus: "And I hereby agree to take one or more share or shares." This was the only point the court had not adverted to.

ROLFE, V. C., said this point had not escaped him, but he did not consider that it altered the case.

In re THE FALMOUTH, HELSTON, AND PENZANCE RAILWAY COMPANY,
ex parte CLARKE.¹

November 9, 1850.

Company—Winding-up Acts—Liability of Provisional Committee-man.

The Master had placed the name of Mr. Clarke on the list of contributories, on the ground that he had allowed his name to be advertised as one of the provisional committee. Mr.

Clarke had taken no shares in the company:—

Held, that a person being one of the provisional committee did not of itself subject him to any liabilities, unless he had authorized expenses being incurred on his behalf. The Master's decision was reversed.

THIS was a motion that the decision of the Master charged with the winding up of the Falmouth, Helston, and Penzance Railway Company, whereby the name of Anthony William Clarke was included in the list of contributories, might be reversed, and that his name might be struck off the said list. It appeared, from the affidavit of the said A. W. Clarke, that he never gave any authority for his name being used in the company; that in October, 1845, when the company was projected, he was solicited by Thomas Harvey, the promoter of the company, to become one of the provisional and managing committee; that he informed the said Thomas Harvey that if a meeting of the persons he proposed to form the committee were convened, and he liked the persons appointed, he should not object to being one of the committee. That in consequence of this solicitation he called several times at the office of Thomas Harvey,

¹ 20 Law J. Rep. (N. S.) Chanc. 14.

Clarke, *Ex parte*.

to ascertain from him when he proposed to convene such meeting; but finding that no meeting had been called, and finding that his name had been printed in a prospectus without his authority, and seeing on a piece of paper affixed to the door of Thomas Harvey's office, where the business of the company was carried on, the words "This is a swindle," alluding, as he believed, to the said company, he refused to join the company, or to be in any way on the committee or otherwise, and that he had subsequently refused to attend any meeting of the said company or the committee thereof. That he had not applied for any allotment of shares in the alleged company to any person whomsoever, nor did he receive any allotment of shares, nor was he in any way interested in the company.

Upon a reference to the Master to wind up this company, a quantity of evidence was produced, and, amongst other things, it was proved that Mr. Clarke went to the office of Thomas Harvey, upon one occasion, and said it would be very desirable to have six or eight gentlemen in London to form a managing committee, and he directed his name to be advertised as one of the committee; and that it was so advertised, and that Mr. Clarke had seen the advertisement, and had not objected to it. The Master, after hearing the evidence, said his opinion was, that Mr. Clarke, before all the world, had suffered his name to remain on the list of the provisional committee, and did no act to displace it. Persons gave credit to the company, and Mr. Clarke was bound by the consequences of his name so appearing. His opinion, therefore, was, that Mr. Clarke must be taken as one liable to contribute to the losses of the company between people who knew not what was going on between him and Mr. Harvey. By suffering his name to remain on the provisional committee, he, in fact, held out to the world that he would exonerate them from the consequences of any credit they might give to the company. His never having applied for shares had nothing to do with the principle: the law did not depend upon that. If, upon seeing his name advertised on the committee, he had ordered it to be struck out, the case would have been different; but as it was, he was liable as a contributory to the company.

Mr. Rolt and *Mr. Taylor* appeared in support of the motion to reverse the Master's decision, and cited the cases of *Barnett v. Lambert*, 15 Mee. & W. 489; s. c. 15 Law J. Rep. (N. S.) Exch. 305; *Reynell v. Lewis*, 15 Mee. & W. 517; s. c. 16 Law J. Rep. (N. S.) Exch. 25; and *Ex parte Cottle*, 2 Hall & Twells, 382; s. c. 19 Law J. Rep. (N. S.) Chanc. 366; *Walstab v. Spottiswoode*, 15 Mee. & W. 501; s. c. 15 Law J. Rep. (N. S.) Exch. 193.

Mr. Bethell and *Mr. G. Lake Russell* appeared on behalf of the official manager, in support of the Master's decision.

ROLFE, V. C. There can be no doubt about the general principle in this case. As to the effect of a person allowing his name to be placed on the provisional or managing committee, whether that in

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itself makes him responsible, before the cases of *Barnett v. Lambert* and *Reynell v. Lewis*, there was a vague notion existing in the mind of the public and the Bar, and I think I may also include the Bench, that a person, by putting his name on the provisional committee, was consenting to all the acts done by the committee, and was liable to the consequences arising from those acts. That was, however, a mistake: and the law is now quite settled that by consenting to have your name on the provisional committee, you only consent to the general scheme, and it only affords evidence to the public that you will concur in any reasonable proposals that may be submitted to you and that you may approve of. Suppose a number of country gentlemen were to meet together and institute a county hospital, and if one or two of those gentlemen were to send for architects and builders, and expenses were thereby incurred, could any one suppose that all would be liable for the conduct of those who took upon themselves to act in the matter? Certainly not. Now, in this particular case, the question is, whether the party has done any thing which takes his case out of the category of persons putting their names on the provisional committee. I do not think that he has. I am not satisfied that any authority was given by Mr. Clarke to Mr. Harvey to incur any expenses with regard to the company. It appears that Mr. Clarke was a friend of a Cornish gentleman who was anxious to promote the undertaking, and that they went together to the office of Mr. Harvey, and suggested that there ought to be a managing committee formed in London; and then it is stated that Mr. Clarke said he was willing that his name should appear on such committee, and directed it to be so advertised. If the word had been "authorized" instead of "directed" his name to be advertised, it would have been nothing; and considering what occurred at the outset, it is very probable that other words than those repeated might have been used. I think, at any rate, that what must be taken to have been meant was this, that Mr. Clarke consented to have his name placed upon the provisional committee, but giving no further authority as to any liability in the concern. Under these circumstances, I think the Master was wrong, and that Mr. Clarke's name ought to be struck out of the list of contributories. The costs of both parties to come out of the estate.

HIGGINS v. FRANKIS.¹

November 13, 1850.

Mortgage — Costs — Foreclosure — Suit — Disclaimer.

A mortgagor devised the mortgaged estate to a person who did not accept the devise, and did not take or claim any benefit under the will. A bill of foreclosure was filed against him, without any allegation that he had been asked to accept the devise. He put in a disclaimer, and the cause was brought to a hearing.

Held, that he was entitled to his costs, to be paid by the plaintiff.

¹ 20 Law J. Rep. (N. S.) Chanc. 16.

Malcolm v. Scott.

THIS was a foreclosure suit. The mortgagor had devised the mortgaged estate to his wife for life, with remainder to Thomas Frankis in fee. Thomas Frankis put in a common disclaimer. The cause now came on to be heard. The only question was as to the costs of Thomas Frankis.

The *Attorney General* and *Mr. Piggott*, for the plaintiff, contended that Thomas Frankis was not entitled to his costs, and that this was according to the recent decisions on the point. They cited and referred to *Tipping v. Power*,¹ 1 Hare, 405; s. c. 11 Law J. Rep. (N. S.) Chanc. 257. *Silcock v. Roynon*, 2 You. & C. C. C. 376. *Gabriel v. Sturgis*, 5 Hare, 97; s. c. 15 Law J. Rep. (N. S.) Chanc. 201. *Ohrly v. Jenkins*, 1 De Gex & Sm. 543; s. c. 17 Law J. Rep. (N. S.) Chanc. 22.

Mr. C. P. Roupell, for Thomas Frankis, contended that there was a distinction between this case and those cited on behalf of the plaintiff. It did not appear here that Thomas Frankis ever had accepted the devise, and consequently that he ever had any interest in the property.

KNIGHT BRUCE, V. C. — The assumptions which I make are these: that this defendant never had any connection, concern, or interference with the property, except as the devisee of a person who was interested in the equity of redemption; that he has never taken or claimed any benefit of any kind under the will; that he has never accepted the devise under it; and that he was never, before the suit, asked to accept. If this be so, he is a person who never had any personal participation in the matter. He is brought here merely as having been mentioned in a will, under which he never took or accepted any interest, without any allegation that he was ever asked, before the suit was instituted, whether he would accept or not. If these things be so, I must give him his costs, which must be paid by the plaintiff.

MALCOLM v. SCOTT.¹

April 13, 1847. December 5, 6, 1849. November 19, 20, 22, 25, 1850.

Appropriation — Contract — Equitable Assignment — Costs.

A Calcutta firm, writing to their agents and consignees in London, directed them, if in funds, to hold 10,625*l.* at the disposal of M., a creditor of the Calcutta firm, promising, if the funds were not sufficient, to make a further remittance upon general account; and, by a letter of the same date, the Calcutta firm advised M. of the directions given to the London firm. The London firm received this letter on the 12th of March, 1841, and immediately advised M. thereof, stating that they were then in cash advance to the firm to a greater amount than the expected remittances were likely to cover; and concluded, "We have, however, registered the above, and should remittances or consignments come forward

¹ 20 Law J. Rep. (N. S.) Chanc. 17.

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to enable us to meet their wishes, we shall lose no time in advising you." In 1842, the Calcutta firm revoked their order in favor of M. Upon bill by M. against the London firm and others, it was held by the Court below that the effect of the correspondence entitled M. to an account, as against the London firm, of the balance in their hands on the 12th of March, 1841, on their general account with the Calcutta firm, and of the consignments and remittances of the Calcutta firm to the London firm up to the revocation of the order, the London firm to have credit in such account for all dependences existing between them and the Calcutta firm on the 12th of March, 1841. Upon appeal, the Court directed the cause to stand over until the plaintiff had established his right by an action at law; and the final result of that action being, that the correspondence created no contract at law by the London firm to appropriate the proceeds of future remittances (after satisfying their then dependences) in satisfaction of the 10,625*l.*, the bill was dismissed.

Quere — Where a mutual correspondence between a debtor and his creditor and the consignee of the debtor, as to the appropriation of certain funds in the hands of the consignee in favor of the creditor, is resolvable into a legal contract, whether a claim on the ground of equitable assignment can be maintained, independent of the legal contract.

Where, upon appeal, the order of the Court below was varied, and, by inadvertence, the cause was heard on further directions by the Court of Appeal.

Held, that this circumstance ought not to affect the right of the successful party to those costs which he would otherwise have been entitled to.

The plaintiff, George Malcolm, a merchant carrying on business at Liverpool, under the firm of George Malcolm & Co., was a creditor of Adam, Scott, & Co., carrying on business as merchants at Calcutta. The defendants, Scott, Bell, & Co., who carried on business as merchants in London, were the London agents and consignees of Adam, Scott, & Co. The bill prayed a declaration that the several consignments and remittances made by Adam, Scott, & Co., after the 16th of January, 1841, to Scott, Bell, & Co., ought to be applied, after satisfying the then existing debt and demands of Scott, Bell, & Co., against Adam, Scott, & Co., in the first place in payment and satisfaction to the plaintiff of the sum of 10,625*l.*, appropriated to the use of the plaintiff by Adam, Scott, & Co.; and that an account of such consignments and remittances might be taken, and the amount thereof applicable to the payment of the 10,625*l.* ascertained. *Vide* 14 Law J. Rep. (N. S.) Chanc. 57.

The plaintiff's claim was founded upon the following correspondence:—

"Calcutta, 16th January, 1841.

"Messrs. SCOTT, BELL, & Co.

"Dear Sirs: Ere this reaches, we hope you will have realized a large portion of our consignments and remittances *via* Colombo, China, and Mauritius, to enable you to dispose of the following sums from our general account with you. Although we are pretty confident you will be in possession of funds, we are not certain, and do not, in consequence, grant drafts. We are desirous of remitting Cs. Rs. 100,000 to Mr. George Malcolm, as if by a draft to-day at ten months' date, at exchange 2*s.* 1½*d.* per Cs. R., 10,625*l.*, which would fall due in London 19th November next; Cs. Rs. 50,000 to you and Mr. W. Scott for his loan to the writer, dated as above, at exchange 2*s.* 1½*d.*, 5,312*l.* 10*s.*, together 15,937*l.* 10*s.* Should you be in possession of funds, we have to request the favor of your holding these sums at Mr. Malcolm's and your own disposal respectively, under the

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discount of the Bank of England rate. We shall know to a certainty, in a short time, whether funds sufficient will be transmitted to you to meet these sums on or before the 19th November next; and should it appear to us that there will not be enough, we shall send a remittance from this to go to credit of your general account.

(Signed) "ADAM, SCOTT, & Co."

"Calcutta, 16th January, 1841.

"GEORGE MALCOLM, Esq.

"My dear Sir: Before we can make up our accounts here, we must be put in possession of all the accounts from you, relative to the transactions of the Calcutta firm up to 30th April last, and I am unable, in consequence, to say how our cash account will stand, so as to enable me to regulate the remittance of your stock and that standing in my own name; but being anxious to make some funds available to you, I have written officially to Messrs. Scott, Bell, & Co., to hold at your disposal, on or before the 19th November next, 10,625*l.*, being the equivalent of Rs. 100,000, exchange 2*s.* 1½*d.* Our friends will hold this amount at your disposal under discount, immediately after the receipt of this, or as soon as they are in possession of funds.

(Signed) "J. S. B. SCOTT."

"Liverpool, 12th March, 1841.

"Messrs. SCOTT, BELL, & Co.

* * "Messrs. Adam, Scott, & Co. inform us in their letter of 16th January last, received this morning by the overland mail, that they had written you to hold at our disposal, on or before the 19th November next, 10,625*l.*, and that you would hold this amount at our disposal, under discount, immediately after receipt of their letter, or as soon as you were in possession of funds. Would you have the goodness to let us know whether you will allow us to draw on you for the whole amount due on the above date, or for a part at a shorter date?

(Signed) "GEORGE MALCOLM & Co."

"London, 12th March, 1841.

"GEORGE MALCOLM, Esq.

"Dear Sir: We beg to advise you, that by the overland letters from India, received yesterday, we are requested by Messrs. Adam, Scott, & Co. to account to you for the equivalent of Cs. Rs. 100,000, at 2*s.* 1½*d.* per rupee, ten months after the date of their letter, (16th January last,) or to hold that amount at your disposal under discount at the Bank of England rates, if convenient to us, and provided we are in funds from their consignments and remittances *viâ* Colombo, China, and the Mauritius. At the present time we are considerably in cash advance for the firm, and the consignments and remittances hitherto advised will, we think, fall short of the engagements we are under on their account. We have, however, registered the above; and should remittances or consignments come forward to enable us to meet their wishes, we shall lose no time in advising you.

(Signed) "SCOTT, BELL, & Co."

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"Liverpool, 13th March, 1841.

"Messrs. SCOTT, BELL, & Co.

"Dear Sirs: I am favored with your letter of yesterday. It may be proper to inform you, that the money which Messrs. Adam, Scott, & Co. request you to hold at my disposal, namely, Cs. Rs. 100,000, or 10,625*l.* cash, 19th November next, is a portion of my own funds, which I expected to have received direct. In ordering the payment through you, they will, of course, make due provision for it; and, although they could not know how much of the amount might be realized by you at dates prior to the 19th November, there is no doubt expressed as to your being, ere that time, in funds for the whole. There is evidently no reason to suppose any thing else than that ample remittances are on the way, or that they will be received in good time; but in order to prevent any uncertainty or mistake on this point, Messrs. Adam, Scott, & Co.'s attention may be drawn to the subject by letters per next overland mail, so that there may be a timely correction of any oversight or miscalculation on their part. The enclosed letter from Mr. J. S. B. Scott (which please return) will show that he intended to make the money available to me; and, indeed, he could not but know that it must be both inconvenient and disadvantageous to me to be deprived of the use of so considerable a sum for eight months longer. Should you be disposed to give effect to his views and arrangements by granting acceptances, due 19th November, as proposed in G. Malcolm & Co.'s letter of yesterday, they will engage to make due refund of any part of the money short remitted from Calcutta; but I have no apprehension of any such short remittances.

(Signed) "GEORGE MALCOLM."

This letter enclosed the foregoing letter of the 16th of January, from the Calcutta firm to the plaintiff.

"London, 14th March, 1841.

"Messrs. ADAM, SCOTT, & Co.

"Dear Sirs: Acknowledging the receipt of various letters, and amongst others, the following, 16th January, requesting us to account to Mr. Malcolm for the equivalent of 100,000 rupees at 2*s.* 1½*d.*, 10,625*l.*, ten months from the date of your letter, or, should we possess funds of yours arising from your consignments or remittances *via* Columbo, China, and the Mauritius, to discount same at bank rates, you will be aware, before you receive this, that the present state of your account, and of the advices of consignments and remittances coming forward from other quarters, added to the liabilities we may be under on account of your silk piece-goods speculations, will not warrant us meeting this requisition for the present. But should we be in a position to meet it before November next, we shall have pleasure in doing so, and have written to Mr. Malcolm accordingly. The other transfer alluded to in your letter was made on the 31st December last, agreeably to instructions from Mr. Adam in July last, acknowledged by your No. 100, of the 27th October.

(Signed) "SCOTT, BELL, & Co."

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"London, 15th March, 1841.

"GEORGE MALCOLM, Esq.

"Dear Sir: Replying to your letter of the 13th instant, we beg to state that we have no specific knowledge of the remittances *via* China and the Mauritius, referred to by Messrs. Adam, Scott, & Co.; but as a series of about a dozen of their letters are not yet come forward, they may, perhaps, contain the necessary information: and we can only repeat what we said on the 12th, that when remittances or consignments come forward, we shall lose no time in advising you. Meanwhile, it would not be convenient for us to lend our names to acceptances, in the manner you propose.

(Signed) "SCOTT, BELL, & Co."

"Liverpool, 3d April, 1841.

"Messrs. ADAM, SCOTT, & Co.

"Dear Sirs: On receipt of your Mr. Scott's letter to Mr. Malcolm, dated 16th January, we addressed Messrs. Scott, Bell, & Co. on the subject of your order to them to hold at our disposal, on or before 19th November next, 10,625*l.*, being the equivalent of Cs. Rs. 100,000, at the exchange of 2*s.* 1½*d.* They informed us in reply, that with reference to the state of your account with them, they must decline, for the present, making any payment, or granting any acceptance on account of your said order. You will readily conceive the disappointment and the serious inconvenience it is to us to be deprived of the use of so considerable a sum of money. We rely on your taking immediate measures to make the above sum, together with any other money due on Mr. Malcolm's account, or on our general account, available to us by remittances to ourselves direct, and not to make the payment to us dependent on the position of your London account, which it must be difficult for you to estimate exactly, owing to the uncertainty as to the out-turn of your produce remittances.

(Signed) "GEORGE MALCOLM & Co."

"Calcutta, 20th April, 1841.

"Messrs. SCOTT, BELL, & Co.

"Dear Sirs: We have now made our entries in conformity with the statements of our account-current forwarded in your letters No. 5 and 6, both of which appear to be correct; and we beg to wait upon you with further statement of our London exchange account up to this date, showing at credit side 57,205*l.* 12*s.* 4*d.*; at debit side, 39,690*l.* 17*s.* 4*d.*, ditto dependences 34,919*l.* 6*s.* 11*d.*, — 74,610*l.* 4*s.* 3*d.*; balance in our favor 17,404*l.* 11*s.* 11*d.*; against which will come our conditional order of 10,000*l.* in favor of Mr. Malcolm.

(Signed) "ADAM, SCOTT, & Co."

"Calcutta, 1st June, 1841.

"Messrs. GEORGE MALCOLM & Co.

"Dear Sirs: No. 438 (o) of 3d April informs us that our London friends, Messrs. Scott, Bell, & Co., on being applied to by you on the subject of our order to them to hold at your disposal, on or before

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19th November next, 10,625 $\frac{1}{2}$., had declined, for the present, making any payment or granting any acceptances on account of said order, and conveys to us the expression of your disappointment, and a request that we may immediately make remittances to yourselves direct of the above amount, with any other money due your Mr. Malcolm, and on your general account. We are, ourselves, much disappointed at this proceeding on the part of our London friends, who have likewise advised us of it, and stated their wish to meet the order before November, should they find themselves warranted, by the state of our account, in doing so. We do not doubt, in the least, that they will be in the position to pay the amount from the proceeds of our shipments to them; and were it even otherwise, the presence of Mr. Scott would, we are assured, accommodate the matter; so that we do not think it necessary to notice further your request for remittances to yourselves direct.

(Signed) "ADAM, SCOTT, & Co."

A letter, dated the 18th of January, 1842, from Adam, Scott, & Co. to Scott, Bell, & Co., contained the following passage: "Regarding the conditional order for 10,625 $\frac{1}{2}$ to Mr. George Malcolm, we hereby cancel it."

April 13, 1847. WIGRAM, V. C. The questions to be decided in this cause are, whether, by the effect of the correspondence which passed between Adam, Scott, & Co., of Calcutta, Scott, Bell, & Co., of London, and the plaintiff, a contract was come to between these parties in March, 1841, entitling the plaintiff, as a creditor of the Calcutta house, to an account against the London house for consignments and remittances made to the London house from Calcutta. The second question is, if such a contract is established, what are the terms of the contract, and to what account does it entitle the plaintiff? I use the word "contract" as the most convenient term which suggests itself; for whether such rights as the plaintiff has are said to rest on contract generally, or, according to the argument at the bar, on equitable assignment, the case is the same. The right of the plaintiff will depend upon an account to be taken in this court, the result of which will be to be satisfied out of specific consignments from India, included in that account.

That the correspondence entitles the plaintiff to some account, I cannot bring myself to doubt, and I shall begin by referring, in the first instance, to the entire correspondence on which both questions turn. On the 16th of January, 1841, the Calcutta house, being largely indebted to the plaintiff, wrote to the London house as follows — [His Honor here read the correspondence as set out above.] Now, there are several other letters which passed between the London house and the Calcutta house, in which the Calcutta house state that they are creditors to a large amount of the London house; and the expression "conditional order in the plaintiff's favor" is made use of. The expression "conditional order," as it appears to me, means nothing more than the latter expression "being in funds," and in no other

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way can I understand the word "conditional," as having any application to the case. The letter of the 16th of January, from the Calcutta house to the London house, directs the latter, among other things, if in funds upon general account, to hold 100,000 Cs. Rs., &c., at the plaintiff's disposal. This letter was received in London on the 11th of March, 1841; and on the following day, the 12th, the London house writes to the Liverpool house a letter of that date; and with reference to the argument at the bar, there are three points to be noticed in that letter. I think, upon fair construction, the expression "if convenient" clearly applies to the alternative relating to the discount; secondly, the letter reserves to the London house the right of satisfying all engagements then existing between them and the Calcutta house, (that is, all dependences and liabilities;) and, thirdly, subject to that reservation, the London house agrees in some sense to act upon the Calcutta letter of the 16th of January. The construction which, upon this third point, I put upon the letter of the 12th of March, 1841, does not, in my opinion, admit of serious controversy. The expressions of the letter of the 12th of March, from London to Liverpool, are, "We have, however, registered the above, and should remittances or consignments come forward to enable us to meet their wishes, we shall lose no time in advising you." If these expressions were ambiguous, which I think they are not, the construction I put upon them would be established by the following expression in the letter of the 14th of March, of the same writers to the Calcutta house. After referring to the letter of the 16th of January, and saving to themselves the right to satisfy the engagements they were under for the Calcutta house, they say, "But should we be in a position to meet it before November next, we shall have pleasure in doing so, and have written to Mr. Malcolm accordingly." This sentence appears to me correctly to paraphrase that which I have quoted from the letter of the 12th of March. The Liverpool letter of the 13th of March points out to the London house in what terms the Liverpool house understood the London letter of the 12th. The London letter of the 14th of March to the Calcutta house becomes important, for it shows, beyond dispute, that I have correctly understood the letter of the 12th, from London to Liverpool. The letter of the 15th of March, from London to Liverpool, is also important, because it brings down the whole of the former correspondence to that date, and confirms such engagements as had been come to by the earlier letters. The letters of the 3d of April, 1841, and the 1st of June, 1841, independently of what had been done before, appear to me to make out completely the same view of the case. Admitting, therefore, in the most unqualified manner, that the correspondence between the Calcutta house and the London house, and that between the Calcutta house and the Liverpool house, would not, without more, have conferred any right upon the plaintiff as against the London house, I cannot admit that it is now open to argument that the effect of the triple correspondence, in which each party refers to his communications with the other, has not so consolidated the whole correspondence as to give to each as against the other, for the purposes of this

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cause, the benefit of a contract, such as the correspondence, properly so interpreted, contains.

The second and most difficult question is that which remains, namely, What is the contract embodied in the preceding letters, and to what account does it entitle the plaintiff as against the London house? The plaintiff has contended that, according to the true construction of the correspondence, he is entitled to have a balance struck on the 12th of March, 1841, in the books of the London house, as between that house and the Calcutta house, including, as he admits, an account of all engagements and liabilities then depending between the London and Calcutta house; and in that sense I shall hereafter use the word "balance." He admits the right of the London house to have all the consignments and remittances from Calcutta on general account, after the 12th of March, 1841, applied in satisfaction of the balance due on the 12th of March, 1841; but he insists that, after satisfying the above, he is entitled to have all the consignments and remittances from Calcutta to the London house on general account, after that date, applied in satisfaction of the 100,000 Cs. Rs., equivalent to 10,625*l.* sterling, made payable on the 19th of November, 1841, in preference to any claim the London house may have against the Calcutta house, in respect of new transactions originating after the 12th of March, in like manner as if each consignment or remittance had been specifically appropriated by the Calcutta house. He insists, in effect, that the contract embodied in the correspondence had, once for all, the effect of a general appropriation upon all remittances and consignments made on general account after the 12th of March. The defendants, Scott, Bell, & Co., however, say, that their undertaking (if any) was confined to paying the 100,000 Cs. Rs. on the 19th of November, 1841, if in funds on that day, and not otherwise; and for the purpose of ascertaining whether they are in funds or are not, they claim a right to have all consignments and remittances from Calcutta on general account received after the 12th of March, 1841, applied in the first instance in satisfaction of their own demands against the Calcutta house up to the present time, whether their demand originated out of transactions before or after the 12th of March, 1841.

The inquiry, the result of which must determine the dispute between the parties, may be confined in strictness to two letters, that of the 16th of January, 1841, from the Calcutta to the London house, and that of the 12th of March, 1841, from the London house to the Liverpool house. I do not mean that the other letters are not important, as throwing light upon these two letters, and as confirming the interpretation I put upon them. But it is in the expressions of these two letters properly interpreted that the rights of the parties must, in my opinion, be founded. I will first, then, suppose a single remittance or consignment from Calcutta between the 16th of January and the 19th of November, 1841, to have been made in pursuance of a promise contained in the letter of the 16th of January, 1841, and consider this case, attending to the fact that nothing afterwards occurred till January, 1842, when the Calcutta or London house gave

notice to the plaintiff that his position was to be altered; and secondly, adverting to the fact that, during the whole of that period, the Calcutta house, in fact, claimed to be creditors upon the London house. Upon the question, then, of the construction of the two letters, the letter of the 16th of January, as between the London and Calcutta house, was imperative, "if in funds on general account," on receipt of that letter; that is, after satisfying the balance, the London house was to hold the 100,000 Cs. Rs. at the plaintiff's disposal in the way directed. The London house might have declined this, and might have returned the balance after satisfying their own claim against the Calcutta house; but they could not, as against the Calcutta house, have lawfully retained it for any other purpose except that indicated in the letter of the 16th of January in the plaintiff's favor. The expression in that letter appears to me to be unequivocal in that respect: "Ere this reaches, we hope you will have realized a large portion of our consignments and remittances *viâ* Colombo, China, and Mauritius, to enable you," that is, to enable you, on the receipt of the letter, "to dispose of the following sums from our general account with you." Nothing can more clearly point at an engagement to be made with the plaintiff at that time, conditionally only on the London house being then in funds. The letter proceeds, "Although we are pretty confident you will be in possession of funds," that is, will be so on the receipt of this letter, "we are not certain, and do not in consequence grant drafts." Then follow the two payments required to be made, one to the plaintiff and the other to them; "as if by a draft to-day at ten months' date, which would fall due on the 19th of November." Stopping here, I would ask, whether it would be possible to contend with effect, that if the London house had been in funds on the 12th of March, 1841, or had become so by an immediate consignment or remittance, and had written to Liverpool saying simply, we undertake to act on the instructions of the letter of the 16th of January, they could afterwards have diverted the funds in order to satisfy any new engagement between themselves and the Calcutta house, originating between the 12th of March and the 19th of November? My opinion is that they could not have done so. The letter of the 16th of January proceeds thus: "Should you be in possession of funds," that is, on the receipt of this, "we have to request the favor of your holding those sums at Mr. Malcolm's and your own disposal respectively, under the discount of the Bank of England rate"—an expression which clearly indicates a present liability, to be satisfied on the 19th of November, 1841. The letter then concludes with this important passage: "We shall know to a certainty in a short time whether funds sufficient will be transmitted to you to meet these sums on or before the 19th of November next; and should it appear to us that there will not be enough, we shall send a remittance from this to go to credit of your general account." The words, "in a short time," show to demonstration, that the further remittances on general account, if necessary, as matters then stood, were to be made to meet the engagements with the Liverpool house then to be entered into. The London house,

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being in possession of the above letter, wrote to the Liverpool house the letter of the 12th of March, and after speaking of the engagements they were then under for the Calcutta house as compared with the remittances and consignments hitherto advised, they say, "We have, however, registered the above; and should remittances or consignments come forward to enable us to meet their wishes, we shall lose no time in advising you." Upon the effect to be given to that sentence the whole question appears to me to turn. I will first consider its effects as between the London house and the Liverpool house. Great stress was laid by the plaintiff on the word "registered." I am not disposed to give much weight to that expression. If the letter had ended there, I should probably have thought that the letter amounted to this only, that the London house, in the existing state of their engagements with the Calcutta house, declined at that time to come under any engagement in pursuance of the letter of the 16th of January, but that they had registered, that is, made a note of that letter, as a thing to be acted on or not, according to circumstances. I cannot think that by informing the Liverpool house that they had registered that letter, they were necessarily precluded from making any new arrangements with the Calcutta house. But it appears to me unnecessary to speculate upon this point; for, if the word "registered," standing alone, would have any such meaning in the abstract as the plaintiff has contended for, it appears to me that such meaning would be reduced as well as fixed by that which immediately follows, namely, "Should remittances or consignments come forward to enable us to meet their wishes, we shall lose no time in advising you." They registered the letter for that purpose. Here, again, if any doubt could exist as to the abstract meaning, in mercantile language, of the word "advising," that doubt would be removed by the context. The writers will advise the plaintiff if any remittances or consignments should come forward to enable them to meet the wishes of the Calcutta house expressed in this letter of the 16th of January. Now, what were those wishes? They were, that the balance (if any) then in the hands of the London house after satisfying their own demands, such balance to be immediately increased, if necessary, by further remittances from Calcutta on general account, should be held at the plaintiff's disposal.

The reason assigned in the letter of the 16th of January for not drawing drafts, and the promise of further remittances for the purposes of the letter, are conclusive as to the wishes of the Calcutta house; and as the London letter of the 12th of March refers to the wishes of the Calcutta house, it makes the letter of the 16th of January part of the contract. The London letter of the 14th of March (only two days later) I have already noticed. For what purpose, then, was the London house to advise the Liverpool house of remittances and consignments coming forward to enable them to meet the wishes of the Calcutta house, unless those wishes were to be acted upon? I think the plain and natural effect of the letter is this: If the present funds shall suffice to cover our present balance, (explaining the word "balance" as above,) or if the Calcutta house fulfils its

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promise, and sends further remittances or consignments more than sufficient to cover our balance, we will execute their wishes in your favor. The cases cited at the bar are not nearly so strong in the plaintiff's favor as are the expressions in the letter I have referred to. There is nothing in the letter of the 3d of April, or in the subsequent letters, which necessarily imports that the writers of those letters had put on the letters of the 16th of January and the 12th of March, 1841, that construction for which the London house contends, in opposition to that for which the plaintiff contends. The word "conditional" is, as I have before observed, consistent with the plaintiff's case, that is to say, the order is conditional upon their being in funds, which leaves the question of fact open.

It was said for the London house, first, that it could not have been in the contemplation of any of the parties that the transactions between the London and Calcutta houses should not proceed in their usual course, during the interval between the 12th of March and the 19th of November, 1841; and secondly, that if I put upon the correspondence the construction I have done, I should altogether paralyze those transactions. To the former of these observations I accede; but I cannot accede to the conclusion drawn from it. Nothing is more common in operations between a London house and its correspondent abroad, than for the former to accept drafts or bills drawn upon it by the latter at distant dates, in expectation only of consignments or remittances to be made from abroad to meet the drafts or bills at maturity. In that case, the London house becomes liable to third parties, whether remittances to meet the bills are made or not; and they regulate their subsequent transactions with their correspondents abroad accordingly. The engagement in this case, as I interpret the correspondence, was far less onerous; for it was an engagement with the third party, the Liverpool house, only to pay, in case the remittances arrived: and if this engagement were made, in the sense in which I understand it, the London house would regulate its transactions with the Calcutta house during the interval, between the 12th of March and the 19th of November, 1841, with reference to that engagement, in the same way as it would have done if the bills had been accepted. If the London house, confiding in the solvency and credit of the Calcutta house, had come under an absolute engagement with the Liverpool house, I am persuaded that no mercantile man would say that such an engagement was so out of course in mercantile transactions, that I must strain the construction of the correspondence rather than believe that such an engagement would have been contemplated. The engagement, as I interpret the correspondence, was, that funds in hand and promised consignments and remittances, on general account, — not required to cover the London balance, — should be accounted for to the plaintiff; the effect being, that promised consignments and remittances would come to the Liverpool house specifically appropriated by the effect of the contract as between the London and Calcutta house until the authority was revoked. I cannot doubt this; and the triple correspondence appears to me to put the case on the same footing between all the parties.

Memorandum.

But the observations on this part of the case may be fortified. It was said that the London house has come under new liabilities for the Calcutta house since the 12th of March, 1841. And it is in fact for the purpose of meeting these subsequent engagements that the London house makes this claim in this suit. If such has been the course of dealing between the London and Calcutta house since the 12th of March, 1841, why should I hesitate to believe that they should, among other engagements contract with the plaintiff at the request of the Calcutta house, to satisfy his demand according to order of time at which the debt arose? As to the continuance of the original intention of the Calcutta house until the order was revoked, I certainly entertain no doubt. They claim, as I before noticed, a balance to be due to them from the London house; they might have sent remittances or consignments specifically appropriated for the Liverpool house, unless they had considered the appropriation as sufficiently made by their previous correspondence, directing the application of the general balance. If the balance is not in favor of the Calcutta house, the Liverpool house will not be damaged *quoad* dependences on the 12th of March, as between themselves and the Calcutta house. On the 15th of January, 1842, a letter is written by the Calcutta house revoking the direction to apply the consignments and remittances; and as the Calcutta house clearly might have sent them specifically appropriated, I do not see why they should not have had the power to revoke the application of the consignments.

His Honor then directed certain inquiries before the Master as to the state of the accounts between the Calcutta firm and the London firm on the 12th of March, 1841, and of the remittances and consignments received by the London firm, up to the date of the revocation of the order in favor of the plaintiff.

The defendants, Scott, Bell, & Co., appealed against this decree.

Dec. 5 and 6, 1849. *Mr. Rolt, Mr. Roundell, Palmer, and Mr. Selwyn*, for the plaintiff.

The *Solicitor General* (with whom was *Mr. Cairns*) proceeded to open the case of the appellants, Scott, Bell, & Co.

The LORD CHANCELLOR. Do you contend that I ought to decide this without a trial at law? Of course I should call upon the parties to make the necessary admissions to raise the question of law.

The *Solicitor General*. Undoubtedly. I know your Lordship's feeling on the subject of sending cases to law. I feel very considerable difficulty about it.

The LORD CHANCELLOR. It is not merely because it is a contract. No doubt this Court can construe a contract as well as a court of law; but it is peculiarly a matter on which a special jury are better able, under the direction of a Judge, to come to a right conclusion than

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any one else can, because there are terms used which I dare say a mercantile jury would put a very different construction upon than what the world at large would. At least, it is open to a question of mercantile usage; and where persons are using mercantile terms between each other, with reference to the custom of merchants, it is very difficult to come to a conclusion except with the aid of a jury composed of mercantile men.

I do not think that the Court is sufficiently informed. I think it is a case in which the Court had better withhold its decision until it has had the assistance of a jury. This is what the appellants were willing to take in the Court below. If I had the least doubt about its being covered by the contract one way or the other, and if it involved questions of equitable assignment, of course I should not consider it at all necessary to send the parties to law; but that question of equitable assignment does not appear to me to have the least reference to the present case, because I consider this to be entirely within the breasts of the three parties concerned, and if they have come to any agreement, whatever the construction of that agreement may be, they among themselves had a clear right to regulate the interests of the parties to arise from the future consignments sent to this country from Calcutta. They did by a correspondence come to a contract; and the real question is, What is the effect of that contract, and how is that contract to operate on the state of the accounts as they ultimately stood? It appears that the consignments received exceeded the amount of the plaintiff's demand, after providing for contingencies, as they existed at the date of the contract being entered into. Therefore, on the one construction, if the parties have agreed, that is to say, if the London house have agreed, in concurrence with the plaintiff, entitled to the benefit of the contract, and the house in Calcutta who offered the contract,—if, in point of fact, the house in London did agree to hold the net proceeds of consignments for the payment of this demand, then the fact that there were consignments which exceeded the amount of that demand, would be conclusive in favor of the plaintiff's right. If, on the other hand, they never thought of entering into that contract, and what they really meant was, not to pay at all events the amount of the consignment, but that they would pay as soon as there was on the general account a balance in the plaintiff's favor, that is to say, putting the plaintiff here in the place of the house at Calcutta, I should say, so that in point of fact the contract only was to put the plaintiff in the situation of the Calcutta house, viz., to honor his draft, instead of honoring the draft of the original correspondents from Calcutta—then, on the other hand, the mere fact of the state of the account as it appears (no doubt as it existed) would open the question to another solution; so that either one way or the other, those two states of circumstances being admitted, the question rests entirely on what the parties meant. That depends on certain expressions used, and certain arrangements proposed on the one hand and accepted by the other, to grow out of, and to be applied to, the mercantile transactions between the two or three parties. It does appear to me to be, of all others, a case which ought to

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be decided by a court of law with the assistance of a jury of merchants, who are familiar with the subject matter, and much better competent than any Judge can be to put a construction upon mercantile terms, and to take a right view of the transactions as between merchants who are in the habit of dealing with questions of this sort.

It is not because it is a question of contract merely, that I think this Court ought to require the assistance of a jury and a verdict, but because it is peculiarly a contract which a jury are competent to deal with. And seeing, unquestionably, that there is a great deal to be said on both sides of the question as matter of contract, and the difficulties arising in a great degree from the custom of merchants and from mercantile expressions used, I think it is much safer and much more consistent with the course and practice of this Court, in a case like this, to hold its hand, and not to interfere until the plaintiff has proceeded at law, if he can, to establish his claim. If he can establish this claim, what the Court has to do is simple enough after that. It appears that on the state of the account the question would arise; at the same time I do not think that the party, having come here in the first instance, without having brought an action, if the Court thinks it is a proper case for an action and for the assistance of a court of law, is, therefore, at all precluded from the opportunity, or the right, to go to law to have that question ascertained. I am asked upon this appeal, the Vice Chancellor having come to a conclusion in favor of the plaintiff, upon the ground that the parties meant to undertake to pay out of the proceeds of the consignments, without reference to any intermediate transaction between the London house and the Calcutta house, to consider the defendants as liable under their contract to pay it. I do not give any opinion upon that, because, if I am not to decide it, it is much better I should not.

It appears to me to be a question which has so much difficulty about it, connected with the circumstances and connected with the peculiar expressions, that it would be better it should be matter of legal decision, inasmuch as it is a pure question of law growing out of mercantile transactions.

What I propose, therefore, is, that instead of the decree pronounced by the Vice Chancellor, the cause shall be ordered to stand over, with liberty to the plaintiff to bring such action as he may be advised against the London house, or whoever represents the London house, for the recovery of the amount of his demand, it being admitted that the amount of the consignments received after liquidating the dependences existing at the time when the contract was entered into, exceeded the amount of the plaintiff's demand; but that, on the other hand, it be admitted that the bills and checks paid by order of the house in Calcutta by the London house were such as at all times to exceed any of the moneys received, so that in point of fact there was no actual balance which the Calcutta house could have drawn upon.

The question came on to be tried, at the Liverpool Assizes, on the 4th of April, 1850, on an action for money had and received, when

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Rolfe, B., being of opinion that there was nothing ambiguous in the terms of the correspondence, and that the question was one of law to be decided by the Judge, held that there was no contract founded upon the correspondence, and the plaintiff was nonsuited, with liberty to move to enter a verdict for the amount. Upon this motion being made, the Court of Exchequer unanimously affirmed the decision of Rolfe, B.

Nov. 19, 1850. The cause now came back upon the equity reserved.

The *Attorney General*, *Mr. James Parker*, and *Mr. Cairns*, for the defendants, Scott, Bell, & Co.

Mr. Rolt, *Mr. R. Palmer*, and *Mr. Selwyn*, for the plaintiff, contended, that the result of the action at law had not decided the whole case; that it was still open to the plaintiff to contend that the correspondence raised a case of equitable assignment. *Burn v. Carvalho*, 4 Myl. & Cr. 690; s. c. 9 Law J. Rep. (N. S.) Chanc. 65. *Walker v. Rostrom*, 9 Mee. & W. 411; s. c. 11 Law J. Rep. (N. S.) Exch. 173. *Hutchinson v. Heyworth*, 9 Ad. & E. 375; s. c. 8 Law J. Rep. (N. S.) Q. B. 17. *Corporation of Rochester v. Lee*, 1. Mac. & G. 467.

Nov. 25. The LORD CHANCELLOR, (after stating the facts of the case.) — For the plaintiff it was contended, that by the letter of the 12th of March, the defendants, Scott, Bell, & Co., undertook to pay to the plaintiff the produce of any remittances, &c., after satisfying their then existing demands; that the letter of the Calcutta house, coupled with this recognition of it by the defendants, operated by way of equitable assignment of the whole fund, beyond what was necessary to satisfy the demands of the London house, existing at the date of that letter. The Vice Chancellor held that the correspondence did create a contract binding upon the defendants, and directed a reference to the Master. The defendants, Scott, Bell, & Co., appealed, insisting that there was no equitable assignment or contract. The Lord Chancellor decided that the correspondence did not establish a case of equitable assignment, and that the only question was, whether it established a contract binding on the defendants, and that that was a question of law; but that as the contract, if established, was not available without an account, the case was within the jurisdiction; but he thought that though it was competent to the Court to construe the correspondence, the language of the correspondence was such that it might have some peculiar sense according to commercial usage, and, therefore, that it ought to be submitted to a special jury of merchants; and he gave the plaintiff leave to bring his action, on the ground that the plaintiff's right, if any, was founded upon the contract, and the equity was consequential only upon the establishment of the legal contract; but he said that if there was no contract at law, there was no equity. The plaintiff brought his action, when it appeared that the correspondence did not contain any expressions which ought

Cope, Ex parte.

to be construed in any other than the ordinary sense; and the question being one of law, the Court of Exchequer finally decided that there was no contract arising out of the correspondence. The cause now comes on for further directions. I am satisfied from the judgment of the Lord Chancellor that he thought that the correspondence raised no case of equitable assignment, and that the only equity for an account was consequential upon a legal contract. If I were called upon to decide this question, I should most entirely concur in the opinion expressed by Lord Chancellor Cottenham. The result, therefore, is, that the equity of the plaintiff altogether fails, and the bill must be dismissed.

A question has been raised as to the costs of the present hearing, and it has been contended that, by the practice of the Court, the present hearing ought to have been before the Court below, as the effect of the order of Lord Cottenham was to reverse the Vice Chancellor's order. *Salkeld v. Johnston*, 1 Hall & Twells, 329; s. c. 18 Law J. Rep. (N. S.) Chanc. 493. But on the other side it was contended, that inasmuch as the Vice Chancellor's decree was not in terms reversed, the present hearing was only an adjourned hearing of the petition of appeal. But it seems to me upon principle, that the decree of the Lord Chancellor was a reversal of the original decree; and that this irregularity ought not to affect the right of the parties so as to deprive them of the costs to which they would otherwise have been entitled. The costs, therefore, of the present hearing will follow the general costs of the cause, and be paid by the plaintiff.

In re THE INDEPENDENT INSURANCE COMPANY, *ex parte* COPE.¹

November 9, 1850.

Company — Winding-up Acts — Claim by the Secretary for Salary.

When the above company was formed, it was resolved that no director of the company should be personally responsible for the salaries of the officers, and that no officer should obtain payment for his services until a sufficient sum should have been obtained by the funds of the company for that purpose. It was also agreed that the officers should receive half their salaries until such time as it might be convenient to the company to pay the whole. Upon the company being wound up, the Master disallowed the claim of the secretary for salary during the two years he had acted as such, and one year afterwards for default of notice.

Held, that the claim for the full amount of salary for two years only must be allowed.

THIS was a motion, on behalf of Charles James Cope, who had acted as secretary to the Independent Insurance Company, that the decision of the Master, disallowing his claim of 1200*l.* for three years' salary, as such secretary, might be reversed, and the said claim allowed.

¹ 20 Law J. Rep. (N. S.) Chanc. 28.

Cope, Ex parte.

The above company was projected in the year 1847, and the project having failed, an order was obtained for winding up the affairs under the Winding-up Acts of 1848 and 1849. At a preliminary meeting of the directors of the company in May, 1847, it was resolved that the several officers named in the prospectus of the company should be appointed to the several offices to which their names were attached. It was also resolved, that no director should be personally responsible for the salaries of the officers of the company; and that no officer or officers should obtain payment for his services until a sufficient sum should be obtained by the funds of the company for that purpose; nevertheless, the first fund that should be formed by the payment of deposit on the shares, to be taken by the directors and others, should be appropriated to the payment of the expenses of the formation of the company. The company was completely registered on the 19th of October, 1848, and at a meeting of the directors on the same day, a resolution was passed, that Mr. Holt, the managing director, should be paid 600*l.* per annum, and Mr. Cope, the secretary, 400*l.* per annum, the salaries to commence from the 25th of March, 1848. A memorandum was also added in the following words: "It is understood that Mr. Holt will only be paid 300*l.* per annum, and Mr. Cope 200*l.* per annum, until such time as it may be convenient to the company to pay the whole."

At a subsequent meeting on the 25th of October, 1848, it was resolved that the appointment of Mr. Holt as the managing director, and Mr. Cope, as the secretary, should be confirmed.

At another meeting, on the 2d of November, 1848, it was resolved that an agreement to the following effect should be drawn up for signature by the officers of the company: "It is hereby understood and agreed to by us, the undersigned, that no director or shareholder of this company shall be personally responsible for the salaries of any of the officers of the company; and that no officer or officers of the company shall obtain payment for his services until a sufficient sum shall be obtained by the funds of the company for that purpose." This agreement was signed by W. Holt and C. J. Cope.

The company having failed to reap the benefits expected, the usual winding-up order was obtained, and Mr. Cope carried in his claim for salary, alleging that he had continued to act as secretary to the company from the 25th of March, 1848, to the 23d of February, 1850; and that no notice was given to him by the directors of their intention to discontinue his services, and claiming to be due to him the sum of 1200*l.* for three years' salary as such secretary, including one year for notice, at the rate of 400*l.* per annum, less the sum of 282*l.* 2*s.* 11*d.*, received by him on account thereof, leaving a balance of 917*l.* 17*s.* 1*d.* due to him. This claim was disallowed by the Master.

Mr. Bethell and *Mr. Roxburgh* now moved that the Master's decision might be reversed, and contended that under the resolutions of the directors Mr. Cope was entitled to three years' salary, the last year's salary being in lieu of notice to which he was entitled, as the hiring was by the year. The memorandum stating that the salaries

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were to be reduced to one half until such time as it might be convenient to the company to pay the whole, must now be set aside, as the affairs were being wound up, and there could be no other convenient time, since, if the salaries were not paid now, they never could be paid, and it could not be supposed that that resolution disentitled the officers of the company from receiving ultimately the full amount of their salaries, although it might have been expected that a deficiency of funds would arise upon the first formation of the company. The contract was for 400*l.* per annum, and this would bring the case as regarded the right to a year's notice within the case of *Beeston v. Collier*, 4 Bing. 309. In that case the plaintiff was clerk to an army agent; he continued in the service for six years, and was paid monthly. Being dismissed without notice, he brought an action for the recovery of his salary for the current year, and obtained a verdict. Then as to the resolution respecting the personal responsibility of the directors, it could only have been intended that no individual shareholder or director should be picked out and made answerable for the whole salary.

Mr. Roll and *Mr. Speed*, in support of the Master's finding, contended that there could be no claim made by Mr. Cope under any circumstances for more than two years' salary, since, the company being at an end at that time, there was no one to enter into the contract, and if the claim were to be determined as similar claims were determined in the Court of Bankruptcy, then the claim for the last year would fail; for, although a clerk or servant might be hired for a year, it was the invariable practice in bankruptcy to apportion the salary up to the time the notice was served. It was also contended that Mr. Cope was not entitled to any payment under the resolution passed in that respect until a sufficient sum had been obtained from the funds of the company. The funds meant the money received for premiums upon the policies, and not the payment upon shares. This was made plain by the resolution, that no director or shareholder was to be made personally liable. Now, if the salaries were to be paid out of the shares, then the shareholders would be personally liable, which would be contrary to the intention expressed in that resolution. The salaries were not to be paid in full until it was convenient to the company to do so. This evidently meant until the profits of the company were sufficient to pay the whole amount of the salary; and as the company had failed, it was clear that a convenient time had not arrived, and Mr. Cope therefore could not claim more than 200*l.* per annum.

ROLFE, V. C. The only question appears to me to be the quantum of time. The truth is, that Mr. Cope is not entitled by his contract to more than one year, but he would be entitled in the shape of damages for not having been employed during the second year, and the measure of that damage would be eleven months, perhaps something more; because he is put to a little inconvenience in looking out. It comes so near, it may be very reasonable to take, as

Bird, *Ex parte*.

the measure of damages in the second year, the whole of that year; therefore, I do not think it would be wrong to take it for two years. It is not worth while troubling yourselves with too great minuteness. As to the principle, I have no doubt the meaning of the resolution that they were not personally liable was, that he was not to sue A or B, and say you are the person that employed me. He says, All I look to is the funds of the company when the company is formed. That exonerated the members from personal liability; but it did not exonerate them as members of a formed company to contribute whatever they were bound by contract with the company to contribute. The object was, that they should form funds, and out of those funds the parties should be paid. As to the stipulation that they should not receive more than half until it was convenient for the company, that was a mere embryo arrangement with reference to the then state of the concern. It meant little or nothing. Give us half now, and we will not trouble you as to the other. Mr. Rolt says, Suppose there were no other claims than salaries; if you call on the directors, you are making them responsible; that is, because you are making them responsible to the funds of the company. Then the funds of the company are responsible to you. Admit the claim for 800*l.* minus the sum that has been received, making the amount 517*l.* 17*s.*, Mr. Cope's costs of the proceedings before the Master to be paid out of the estate.

In re THE INDEPENDENT ASSURANCE COMPANY, *ex parte* BIRD.¹
November 22, 1850.

Company — Winding-up Act — Contributories — Certificate of complete Registration.

The Master, upon winding up this company, excluded certain shareholders from the list of contributories, on the ground that the requisitions of the statute 7 & 8 Vict. c. 110, in regard to the deed of incorporation, had not been complied with before the certificate of complete registration was obtained.

Held, that the certificate of the registrar was sufficient evidence of complete registration, although all the requisite provisions might not have been fully complied with.

THIS was a motion, on behalf of the official manager of the above company, that the certificate of the Master, whereby he certified that he had excluded William H. Bird from the list of contributories, might be discharged, and that the name of the said William H. Bird might be included in the said list of contributories for ten shares therein.

It appeared from the Master's report, that the main ground of opposition to Mr. Bird's name being included on the list was, that under the stat. 7 & 8 Vict. c. 110, s. 7, it was required that the deed of incorporation must be signed by at least one fourth in number of

¹ 15 Jur. 30. 20 Law J. Rep. (N. S.) Chanc. 30.

Bird, Ex parte.

the persons who at the date of the deed had become subscribers, and who should hold at least one fourth of the maximum number of shares in the capital of the company, and that such deed must contain a covenant on the part of every shareholder, with a trustee on the part of the company, to pay up the amount of the instalments on the shares taken by such shareholders, and to perform the several engagements in the deed contained on the part of the shareholders; that the deed of incorporation contained a recital that it had been proposed to raise for the purposes of the company a capital of 100,000*l.*, in 8000 shares, of 12*l.* 10*s.* each, on which an instalment of 1*l.* 10*s.* per share was to be paid on the execution of the deed, a previous deposit of 1*s.* 3*d.* per share being payable on the original taking up of the same; that the said company was provisionally registered on the 13th of February, 1847; that W. Holt had been selected as the trustee for the purpose of the covenant, on the part of the shareholders, required by the act of Parliament for insertion in the deed of settlement; that the said deed contained a covenant on the part of the shareholders with the said W. Holt, in the terms required by such act of Parliament; that the said deed was executed by persons holding 2200 shares in the capital of the company; that of these 2200 shares, 50 shares belonged to W. Holt, the trustee with whom the shareholders had covenanted to pay; but that the said W. Holt did not covenant in the said deed with any one; that a certificate of the complete registration of the company was obtained on the 19th of October, 1848; that the holder of 180 shares, having executed the deed subsequently to the date of complete registration, it appeared that the deed was not executed by one fourth of the stock of the company, as the said 180 shares, and the 50 shares held by W. Holt, reduced the 2200 to 1970, when the number should have been 2000.

It appeared that Mr. Bird had taken 10 shares in the company; that he had signed the deed of incorporation, and had paid his deposit upon the shares.

It was contended, on the part of Mr. Bird, that as the deed was never executed by one fourth of the maximum number of shareholders, the company had been unduly procured to be completely registered; that although a person might have executed the deed, still it was no execution unless the requisite number required by the act had executed, and that the company was never completely registered. *Johnson v. Barker*, 4 B. & Ald. 440. It was also contended that the names of the auditors were not set forth in a schedule and tabular form as required by the act, the schedule containing only the word "auditors," without the names.

Mr. Calvert and Mr. Baggallay appeared for Mr. Bird.

Mr. Roxburgh, for the official manager, insisted that, under the 7th section of the 7 & 8 Vict. c. 110, the certificate of complete registration was conclusive evidence, and that the objection could not after that be taken that the deed had not been signed by the requisite

Bird, *Ex parte*.

number of shareholders. The case of *The Bamwen Iron Company v. Barnett*, 19 Law J. Rep. (N. S.) C. P. 17, was relied upon; where to a declaration in debt by a joint-stock company, completely registered pursuant to 7 & 8 Vict. c. 110, s. 35, against a shareholder for certain instalments of capital due on calls in respect of his shares, the defendant pleaded several pleas, which stated that the company was formed by deed under the Joint-Stock Company's Act, and that such deed ought to have contained provisions for prescribing the maximum number of directors, the amount of their qualification, and the time for which they should hold office, so that one third should retire annually, and for determining at what period the instalments of payment on capital were to be made according to the requirements of the said act; that the deed did not make provision for prescribing the maximum number of directors, &c.; that such deed was produced before the registrar as a proper deed, who thereupon, notwithstanding it was not conformable to the provisions of the act, granted a certificate of complete registration to the said company, and that the plaintiffs never were a company completely registered otherwise than as thereinbefore mentioned, and that the defects in the said deed had never been supplied in any supplemental deed. It was held, on demurrer, that the pleas were bad; the certificate of the registrar incorporated a company under the 7 & 8 Vict. c. 110, s. 25, although the deed should be a defective deed.

ROLFE, V. C. I confess I do not think there is any doubt about this. I should have said there was no doubt independently of the authority; because, when I look at the act of Parliament, I confess it seems to me to be pretty clear that the meaning was, that a certain proceeding was to take place; that there was to be complete registration with the registrar; it was not to be lawful for him to register till certain things had been complied with, but that when he had done it he was to give a certificate, and that was what the three persons, those who were engaged as partners in the company, were to look to. And I cannot doubt that, because it is nowhere said you are not to act till all these provisions are complied with; it is this: you are not to act and do certain things till a certificate of complete registration has been obtained. The direction to the registrar is, that he is not to give the certificate until he is satisfied, *inter alia*, that a certain number in value have entered into certain covenants. If he has been guilty of an oversight, and when 1999 had executed he miscounted, and thought there were 2000, it seems a monstrous proposition to hold that as to all third persons to the end of time, as Mr. Justice Maule says, this is to be an insuperable bar to this company proceeding. I think that is not a reasonable construction of the act; but if I had any doubt about it, and if I had been of opinion as strongly the other way as I am in conformity to that view of the question, I should have felt myself completely concluded by this case of *The Bamwen Iron Company*, in the 19th volume of the *Law Journal Reports*. That is as strong a case as can be. I see no difference in principle between the omission of matters which are pointed out

Bird, *Ex parte*.

in the schedule of the act, and those pointed out by the act itself; and if there were any such difference, the pleading here does not raise any such distinction. The pleading is this: the action is for calls, and the plea is, that such deed did not at any time make provision for prescribing the period for which the said directors were to hold office, so that at least one third of such directors, or the nearest number to one third, should retire annually, as in the said statute and schedule respectively mentioned. That the said deed was produced to the registrar of joint-stock companies, as and for the deed of settlement of the said company, setting forth such matters and making such provisions as are required by the same statute, &c.; and thereupon, on production of such deed, and notwithstanding omissions, the certificate was granted. (In commenting upon it, the Judges point out that the omissions in Schedule (A) were omissions of matter that it would be impossible to suppose the legislature could really have contemplated the parties all to have had in their view.) But the plea is a general plea. It is, that the deed did not contain the clause required by the statute. The court held that to be no plea at all; and notwithstanding the omission to state that, without the statement of which the registrar ought not to have given a complete certificate of registration, yet he having done so, they, the company, were enabled to sue for the calls which the statute, united with the deed, enabled them to sue for. If the company could sue, it follows as a matter of course, when the affairs of the company are to be wound up, that now there can be calls made by the official manager upon those who might have been called upon by the company to contribute to the company itself. It seems to me a perfectly clear case, and I must say I entertain little doubt but that if this case of *The Banwen Iron Company* had been before the Master, he would not have reported as he has. It might have been a doubtful matter when before him. I doubt whether this case was before the Master. Very likely this number of the *Law Journal Reports* was not out. At all events, it is *in omnibus* the same case.

Mr. Calvert hoped the Court would think *Mr. Bird* entitled to his costs, as he was obliged to support the Master's decision. The Master had, in fact, refused to take any further proceedings for winding up the company until this case, which was similar to many others, had been settled.

The VICE CHANCELLOR. You should have made an arrangement with the other parties *in pari delicto*. This is no more than an action for calls, and I cannot give you costs of an action for calls which you have improperly resisted.

Wright v. Lukes. Warde v. Warde.

WRIGHT v. LUKES.¹

November 25, 1850.

Payment of Money into Court — Decree — Answer — Admissions.

After a decree in a cause, a motion that the defendants might pay into court money which, by their answer, they admitted to be in their hands, was refused, with costs.

THIS was a motion that John Lukes might pay into court the sum of 1600*l.* cash, admitted by his answer to be in his hands, and that John Lukes and Robert Starbuck might transfer into court the sums of 4000*l.* 3*¼**l.* per cent. annuities, admitted by their several answers to be in their names in the books of the Bank of England.

Mr. Glasse appeared in support of the motion.

Mr. Southgate, on behalf of John Lukes, objected to the application being heard. On the 25th of April, 1843, a decree was made in the cause directing inquiries as to parties, and as to the children and grandchildren of John Starbuck, the testator. This must be considered as having provided for the rights of all parties up to that period, and the present is an attempt to vary a decree upon a notice of motion. *Burn v. Bowes*, 6 Law J. Rep. (N. S.) Chanc. 275. *Binns v. Parr*, 7 Hare, 288; s. c. 19 Law J. Rep. (N. S.) Chanc. 401

THE MASTER OF THE ROLLS. The application must be refused, with costs.

WARDE v. WARDE.²

November 7, 1850.

Privileged Communication — Solicitor.

A husband and wife being desirous of releasing an estate from the wife's jointure, a solicitor is employed and a deed executed, the wife having no other legal adviser in the matter. A suit being instituted, the husband and solicitor each state, in their answer, that the solicitor acted for the husband. Production of certain cases prepared and opinions taken by the solicitor refused.

By the settlement made on the marriage of Charles Thomas Warde and Marianne Warde, and dated the 18th October, 1834, certain manors and lands in Warwickshire were conveyed by the said Charles Thomas Warde to trustees, to the use of the said Charles Thomas Warde during his life, and, after his death, then to the use that the said Marianne Warde should receive thereout during her life an annual sum or rent-charge of 1000*l.* by way of jointure, and upon certain further trusts for raising 20,000*l.* as portions for children; and

¹ 20 Law J. Rep. (N. S.) Chanc. 32. ² 14 Jur. 1040. 20 Law J. Rep. (N. S.) Chanc. 36.

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in the said settlement were contained powers for the said Charles Thomas Warde to substitute any other lands of ample value, in England, in lieu of the lands thereby settled, and that thereupon it should be lawful for the trustees to revoke all the uses thereby declared concerning the said manors and lands in Warwickshire. In the year 1844, Charles Thomas Warde contracted for the purchase of the Luton Hoo estate for 150,000*l.*, and paid a deposit of 5000*l.* upon the contract, and engaged to pay the further sum of 50,000*l.* in March, 1845. In order to enable him to pay this sum, he contracted to sell the Warwickshire estates; but the purchaser objected to the purchase, on account of the charge of the said jointure and portions. Mr. Warde thereupon, as the bill in this case alleged, being unable to complete either contract, applied to his wife and her surviving trustee, and proposed to raise and pay the portions, and to charge the jointure on the Luton Hoo estate, as soon as the purchase was completed, and that in the mean time those sums should be charged on certain chief rents. Ultimately, however, it was agreed that Mr. Warde should pay the 20,000*l.* to the trustees of his marriage settlement, which was afterwards done, and Mrs. Warde agreed to release the Warwickshire estates from her jointure, on the distinct understanding (as the bill alleged) that it should be charged on the Luton Hoo estate; and her trustee also agreed to concur on the same understanding. In pursuance of instructions to that effect by Charles Thomas Warde, given to his legal advisers, an indenture was prepared, which was, in November, 1845, executed by Mrs. Warde and her trustee, releasing the Warwickshire estates from the jointure, and containing a covenant on the part of Mr. Warde to charge the jointure on such further estates as he should acquire. Mr. Warde afterwards completed the purchase of the Luton Hoo estate; and this bill was filed, on the 17th August, 1849, by Mrs. Warde, against Mr. Warde, the surviving trustee of the marriage settlement, and Henry Bury, the trustee of the indenture of 1845, stating as above stated, and charging that Charles Thomas Warde, in the year 1845, laid before counsel divers cases, and gave divers instructions for the preparation of deeds; and that considerable correspondence passed between Mr. Warde or his legal advisers, and the trustees of the settlement and their legal advisers; and that Mrs. Warde had no separate solicitor or counsel, and that she entered into the aforesaid arrangement under the advice of the solicitor and counsel of Mr. Warde; and praying that Mr. Warde might be decreed to charge the Luton Hoo estate with the said jointure. Charles Thomas Warde, by his answer, filed in March, 1850, denied that he intended to charge any specific after-purchased property with the said jointure. He admitted that the indenture of 1845 was prepared by his legal advisers, in pursuance of general instructions given by him, but not in compliance with his intentions; for at that time he never intended to enter into any engagement to charge the after-acquired property with the jointure, which was, in fact, extinguished. He stated that he had contracted to sell the Luton Hoo estate, and was, therefore, unable to charge it. He admitted that, in the year 1845, he laid before counsel divers cases, and gave

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general instructions for the preparation of all necessary deeds for releasing the Warwickshire estates, and that some considerable correspondence took place, as in the bill mentioned. He submitted that he was not bound to produce, or answer as to the purport or nature of, the instructions given by him to his solicitor or legal adviser, or the cases laid before counsel, or the correspondence that passed between him and his solicitors, having reference to the matters in issue in this cause; and he admitted that Mrs. Warde had not separate solicitors or counsel, and that she entered into the aforesaid arrangement for the release of the Warwickshire estates, under the advice of his solicitors and counsel, without having any other legal advisers. In the second schedule to his answer he set out a list of such documents, and submitted that he ought not to produce them. The defendant, Henry Bury, by his answer, stated that he and his late partners acted as the solicitors or professional advisers of the defendant Warde, in the purchase of the Luton Hoo estate, except as to the contract for the purchase, and certain contracts for the sale of parts thereof; that he had no authority or permission from the defendant Warde to make any disclosure to the plaintiff, in any wise relating to the matters aforesaid, and submitted to the judgment of the Court whether he ought to answer. He admitted that the plaintiff had not any separate solicitors or counsel, and that she did enter into the arrangement in the bill mentioned for the release of the Warwickshire estates from the said jointure, and that she executed the indenture of 1845 under the advice of the solicitors and counsel of Charles Thomas Warde, and, as this defendant believed, without having any other legal adviser; that there were in the possession of this defendant and his late partners, as such solicitors as aforesaid, divers documents relating to the purchase of the Luton Hoo estate, and the sale of the Warwickshire estates; and he submitted whether he could, without violation of professional confidence, disclose whether, by such documents, the truth of the matters aforesaid would appear, or whether he ought to produce such documents. The plaintiff now moved that the defendants, Charles Thomas Warde and Henry Bury respectively, might produce the documents admitted in their answer to be in their respective possession, particularly the documents alleged by the defendant Bury to be privileged. In opposition to this, Mr. Warde filed an affidavit that Henry Bury had been his solicitor; that, at the time he put in his answer, he had forgotten that Henry Bury had the documents mentioned in the schedule to Henry Bury's answer; that such documents all came into the possession of Henry Bury as Mr. Warde's solicitor; and that the cases and opinions mentioned in that answer were laid before and obtained from counsel, after some discussion had arisen with reference to the proposed arrangement of releasing the Warwickshire estates, and on the behalf of Mr. Warde alone.

Stuart and Dickinson, in support of the motion. At the time when the negotiations took place, Mr. Warde and Mrs. Warde employed the same solicitor, and each of them is, therefore, entitled to have the documents produced. The documents to be produced are

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mostly cases and opinions, which we must suppose to have been taken for the benefit of both. It may be true that only Mr. Warde consulted Mr. Bury, but he consulted for his wife as well as himself. It is not as if there had been a dispute and separate solicitors. The advice given to the wife cannot be separated from that given to the husband. *Hughes v. Biddulph*, 4 Russ. 190.

Bethell and *Erskine* opposed. The statements on the answers are distinct, that Mr. Bury was the solicitor of Mr. Warde only, and there is nothing whatever to show that, for this purpose, Mr. and Mrs. Warde are to be taken as one person. Did Mrs. Warde or her trustee pay any part of the expenses? *Herring v. Cloberry*, 1 Ph. 91.

Stuart, in reply.

ROLFE, V. C. I confess that I have come to the conclusion at which I do arrive in this case somewhat with reluctance; but the conclusion at which I have arrived is, that I cannot order the production of these documents. I think, in the first place, that this must be treated just in the same way as it was put at the bar, namely, as if the petitioner, instead of being the wife of Mr. Warde, had been a stranger having a charge on the Warwickshire estates, and that Mr. Warde, having entered into a contract for the sale of those estates, found himself embarrassed in the progress of that treaty by the charge upon them of the plaintiff, whom, for the present purpose, I suppose to be a stranger. Then he goes to his solicitor to find a mode of getting the estates relieved from the charge; he consults his solicitor, takes various opinions of counsel, adopts various modes of proceeding, and negotiations and correspondence, and so forth, go forward. As far as that is concerned, if the matter rested there, there would be no doubt; and if the plaintiff adversely afterwards instituted proceedings, she could not compel the defendant to produce that which had passed between him and his solicitor; for I take it, whatever might have been the view formerly taken, that it is now clear, that any thing that passes between a party and his solicitor, whether in a cause, or with a view to a cause, or with reference to a matter that afterwards becomes the subject of litigation, is a privileged matter, in respect of which the client has a right to say the solicitor shall not disclose what passed. There can be no doubt, in that state of things, that the plaintiff would not have a right to call for the production of the opinions and cases so taken. Then does it alter the case, that the plaintiff did not choose to employ a solicitor of her own, but chose to act on the advice of the same party who was giving advice to the person who was selling the estate? I think that makes no difference, unless you can bring it to this point, that the two (I call them vendor and purchaser, the party having the charge and the party selling the estate) employed the same solicitor in taking those opinions. There the solicitor is their joint solicitor, and there can be no doubt that either party may call for the production of those documents; for, in truth, in such a case as that, professional confi-

dence would be absurd; there is exactly the same professional confidence with the one as with the other; but, unless you can bring it to that, the circumstance that the party having the charge chooses to rely on the advice of the same person, that the party selling the estate was consulting, does not seem to me to make any difference at all. It may make it, as a matter of fact, rather more probable that they were jointly employed; but, unless you can bring it to that, it does not seem to me to vary the case. Is it, then, different in the case of a wife? I put out of the question the husband and wife being for many purposes considered as the same — a sort of legal fiction, meaning that their interests are in a great measure identified; but I consider that that makes no difference at all, except so far as it would be a circumstance rendering it infinitely more probable that the solicitor was employed as the common solicitor for both; but exclude that fact, and once establish that the solicitor was acting for one only, then I think the circumstance of the party having the charge, being the wife, makes no difference. It makes it far more probable that the solicitor was employed for both; but excluding that, I think it makes no difference at all. Now, that being so, I come to the conclusion that there is nothing here which amounts to any admission that any of these documents are documents which the plaintiff is entitled to see; they are sworn distinctly by Mr. Warde in his affidavit (it has been called a supplemental answer as well as an affidavit) to have been taken on his sole behalf, and not on behalf of himself and any other person, which would include not only him, but his wife. They were taken on his sole account, and the only way in which that is attempted to be met is by reading the admission in the answer of Mr. Warde, and an exactly similar admission in the answer of Mr. Bury, that the plaintiff had not a separate solicitor or counsel; that she entered into the arrangement for the release of the Warwickshire estates, and executed the indenture, under the advice of the solicitor and counsel of the defendant, without any other legal advice. It does not at all follow that she entered into it in pursuance of certain opinions that her solicitor, or the party acting for her, had taken. It is only the advice of the solicitor, who, acting, in taking these opinions, for the husband, thought himself warranted in advising the wife to execute that deed, and she, upon that advice so given, does this act. Whether, by amending the bill, any charge could be introduced, showing that Mr. Warde either had actually acted as her agent, or led her to consider that he was acting as her agent, in taking these opinions, is a matter on which I need not speculate. Such a case might be made, but, in the present state of things, I think, that if Mrs. Warde, the plaintiff, had been a stranger, there is nothing to show that these cases were taken on her behalf, and that the circumstance of her being the wife of the defendant makes no difference: consequently this motion must be refused.

In re The Buckinghamshire Railway Company.

*In re THE BUCKINGHAMSHIRE RAILWAY COMPANY.*¹

November 8, 1850.

Costs — Alterations.

The costs of obtaining orders for the investment of purchase money, paid by a railway company in alterations of almshouses, not to be borne by the company.

THE Buckinghamshire Railway Company had purchased a part of lands belonging to charities, called "The Middle Claydon Trust" and "The Middle Claydon Almshouses," and had paid the purchase money (762*l.*) into court in the usual manner. The Master had made a report, finding that a proposed application of 200*l.*, part of the purchase money, towards the alteration and improvement of the almshouses, by dividing the rooms in them, and of 512*l.*, other part of the purchase money, in the purchase of certain lands, would be advantageous to the charities. The trustees of the charities now presented their petition to have the report confirmed, to have the requisite sums sold out, and to have the costs of a former application and of this application, and consequent thereon and incidental thereto, and of all other proceedings relating to the said applications, payment, and reinvestment, paid by the company.

Calvert, for the petitioners, cited the 60th and 80th sections of the Lands Clauses Consolidation Act.

Speed opposed the payment of the costs, so far as they related to the alteration of the almshouses, and contended that they did not come within the terms of the 80th section. The Court has no power to give costs. *Re Isaac*, 4 My. & C. 11. Many of the old acts did not contain any provision for the costs of obtaining payment out of court, and they were always refused.

Calvert, in reply. It cannot be denied, that if the money had been applied in redeeming land tax, the costs must have been paid by the company, and yet they are not expressly included in the 80th section. We contend that the company must pay the costs of any proper mode of investment.

ROLFE, V. C. I am very sorry to say I cannot concur. It is, perhaps, a great omission from the act, but I do not think that these words, construed fairly, do include the case, though I have no doubt that the legislature, if asked, would say they did intend that it should be included. The case is this: The purchase money is to be paid into court, and may be invested in a variety of ways — in the redemption of land tax, in the reinvestment in land, and in payment to any person absolutely entitled. Then certain other directions are given,

 Stuart v. Lloyd.

and then this clause, which I have no doubt was meant by the legislature, or rather the legislators, to include all costs which might be incurred in replacing the lands: "The costs of the purchase or taking of the lands, or which shall have been incurred in consequence thereof; and the costs of the investment of such moneys in Government or real securities, and of the reinvestment thereof in the purchase of other lands; and also the costs of obtaining the proper orders for any of the purposes aforesaid." Now, what is the meaning of "purposes aforesaid"? Mr. Calvert contends that it means any purposes previously mentioned in the act. I think it means the costs of procuring orders for any of the purposes just mentioned; that is to say, the costs of taking the lands, of the investment, and of the reinvestment, and of obtaining the proper orders for those purposes. I come to this conclusion reluctantly; but I observe that, besides what I have stated, the act goes on to make provisions for the payment of certain other costs. But if Mr. Calvert's construction obtained, these words would be unnecessary, as those costs would be included.

Ordered as prayed. Costs according to the act, but the company are only to pay the costs so far as the application is rendered necessary for the purpose of investing the 512l. No costs as to the remainder of the petition.

 STUART v. LLOYD.¹

November 14, 1850.

Dismissal — Impertinence.

Though exceptions for impertinence had been filed after the answer had become sufficient, the defendant had a right to move to dismiss.

THE answer in this case was filed on the 24th May, and became sufficient on the 5th July. On the 6th July, the plaintiff filed exceptions for impertinence.

T. J. Phillips now moved, on the part of the defendant, to have the bill dismissed for want of prosecution. The pendency of exceptions for impertinence is no answer to an application to dismiss; otherwise, as there is no time limited for referring exceptions for impertinence, the defendant might be prevented forever from having the bill dismissed; besides, these exceptions were not filed till after the answer had become sufficient. Even if these exceptions are allowed, and the passages struck out, the answer will still be sufficient.

Bethell and *Bazalgette* opposed. By expunging the impertinence, the answer may become insufficient. We have filed our exceptions, and the bill ought not to be dismissed till they are disposed of.

 Russell v. East Anglian Railway Company.

ROLFE, V. C. It may be, that, by striking out the impertinent matter, you will make the answer insufficient; but, still, I think that, within the meaning of the 16th order of 1845, the answer must be taken to have been sufficient on the 5th July, and cannot be made otherwise by subsequent proceedings, and the plaintiff is right in moving.

 RUSSELL v. EAST ANGLIAN RAILWAY COMPANY.¹

November 14, 15, 16, 18, 19, and 21, 1850.

*Receiver's Possession—Contempt by Sheriff and Execution Creditor—
Vindication of the Authority of the Court—Costs—Collusion—
Merits.*

A railway company, being greatly indebted to bond and simple contract creditors, made an arrangement with the majority, but to which some refused to accede, and one creditor by simple contract obtained a judgment. On a bill filed by a bond creditor against the company and other persons representing several classes of creditors, a receiver and manager of the company's effects was appointed by consent and put into possession, and a few days after the sheriff levied on behalf of the judgment creditor. On motion to commit the sheriff for contempt in disturbing the receiver, he justified his levy on the ground that the appointment of the receiver had been collusive, and intended to defeat the judgment.

Held, that the court was bound to justify its authority, without reference to the propriety or otherwise of the order for a receiver, and to protect its own officer, and the sheriff was ordered to withdraw from possession and levy the costs of the motion. The order made was to be without prejudice to any application by the execution he might make, to be heard *pro interesse suo*.

This was an appeal motion on behalf of the plaintiff in the cause, to discharge an order made by Vice Chancellor Knight Bruce, whereby it was ordered that the plaintiff's motion to commit the sheriff of Norfolk and his under sheriff, for contempt in disturbing and interfering with the possession, the receiver in this cause should be dismissed with costs as against the sheriff and under sheriff, reserving the question by whom such costs should be ultimately borne, and the substantive motion for committal of the sheriff and under sheriff was renewed before his lordship for contempt, in interfering with the receiver by levying an execution at the suit of creditors named upon the effects of the East Anglian Company, and in taking possession of carriages and other goods or stock, part of the effects of the company on the railway, in the possession of the receiver; and for an injunction to restrain the sheriff from levying any further execution upon the railway, and taking possession of any of the goods of the company under the control of the receiver.

The bill in this cause was filed in June, 1850, by the plaintiff, a bond creditor of the East Anglian Railway Company, which, after stating the various acts of Parliament under which the company was authorized to borrow money, and the present amount of the compa-

¹ 14 Jur. 1033.

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nies on bonds and mortgages respectively, allege that the plaintiff had applied for payment of his principal money, which they refused to pay. The bill also contained various charges as to the priorities and rights of different classes of the company's bond creditors, that certain persons named had mortgages, and that the respective rights and interests of the bond and mortgage creditors ought to be ascertained; that provision should be made for payment of all the company's creditors, and that a receiver should be appointed to take the management of the estate of the company, and to have the direction of the working of the railways belonging to the company, and to collect the tolls and other effects of the company; and for an injunction to restrain the company from receiving their tolls and effects; and that the company should be decreed to deliver up their effects to such manager. And the prayer of the bill was in accordance with these statements and charges. The company's answer admitted the principal allegations of the bill, and on the 25th of June last an order was made by consent that William Seppings should be appointed "to take and have the management of the estate and effects of the company, and to have the direction and superintendence of the working of the several railways belonging to or under the control of the company, and of all the other businesses of the company." The object of this suit, and the appointment of a receiver, was to prevent several bond and simple contract creditors, who were suing the company at law, obtaining a priority over the rest of the creditors, and who had refused to enter into an arrangement which had been assented to by the majority of the creditors. Soon after the order the receiver was formally put in possession, and a day or two afterwards the sheriff of Norfolk seized some of the engines and carriages under a *fi. fa.* on a judgment obtained by Messrs. Bowes & Company for 2000*l.* and upwards. In consequence, the original motion to commit the sheriff was made, and by order of the Vice Chancellor, notice of the motion was also served on the execution creditor. The plaintiff and defendants having declined to bring the debt and costs of the execution creditor into court, the Vice Chancellor made the order now complained of. This suit was carried on under the direction of a committee of bond creditors, who had entered into an arrangement with the company with respect to their debts.

Sir *F. Kelly*, *Bethell*, *Bacon*, and *Miller*, for the plaintiff, supported the appeal motion.

R. Palmer, *Bunny*, and *Ispland*, for the sheriff.

Rolt and *Toller*, appeared for the execution creditor.

Calvert and *Bagalley*, for the company.

Malins, *Rogers*, *Martindale*, *Goodeve*, *Dickinson*, and *Pryor*, for other defendants.

Bethell, in reply.

The cases cited were the following: *Doe dem. Wyatt v. St. Helen's Railway*, 2 Q. B. Rep. 201. *Pardoe v. Price*, 11 Mees. & W. 29.

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Angel v. Smith, 9 Ves. 335. *Payne v. Drewe*, 4 East, 523. *Rock v. Cook*, 2 Phill. 691. *Onyon v. Washbourne*, 14 Jurist, 497. *Winter v. Miles*, 10 East, 578. *Gooch v. Haworth*, 3 Bea. 428. *Drewry v. Thacker*, 3 Swans. 529. *Aston v. Heron*, 2 My. & K. 390. *Hartley v. Gilbert*, V. C. of England, 31st May, 1842. Lord Lyndhurst, C. 21st Dec. 1842. *James v. Dore*, Rolls, 17th Dec. 1745. *Braham v. Bowes*, 20th Dec. 1823. *Hammond v. Mayber*, Reg. Lib. A, 1820, fol. 1905. *Oswald v. Landell*, Reg. Lib. B, 1839, fol. 546. *Franklyn v. Thomas*, 3 Mer. 235. *Wells v. Pickman*, 7 Term Rep. 174. *Chaplin v. Cooper*, 1 Ves. & Bea. 16. *Cameron v. Reynolds*, Coop. 403. *White v. Chapple*, 4 C. B. 628. *Belcher v. Patten*, 6 C. B. 608. *Wilson v. Aldridge*, 8 Mod. 315. *Stockdale v. Hansard*, 11 Adol. & El. 253. *Adams v. Osbaldestone*, 3 B. & Ad. 489. *Reg. v. Ledgard*, 19 B. 616. *Reg. v. Powell*, 1 Q. B. 352. *Clark v. The Leicestershire & Northamptonshire Canal Company*, 6 Q. B. 898. *Reg. v. Williams*, 2 Car. & K. 1001. *St. John's College, Oxford, v. Murcott*, 7 Term R. 259. *Musket v. Drummond*, 10 B. & Cr. 153. *Nelson v. Cherrill*, 8 Bing. 316. *Partington v. Booth*, 3 Mer. 148. *Robinson v. Lord Byron*, 2 Dick. 703. *Woodward v. Earl of Lincoln*, 3 Swans. 626. *James v. Dobree*, MSS. 1743. — *Casher v. Paynter*, MSS. 1738.

November 21. The LORD CHANCELLOR. This case of *Russell v. East Anglian Railway* is brought before me upon motion, by way of appeal, against an order made by Vice Chancellor Knight Bruce, and the object of this application is to discharge that order. That order was made upon an application to commit the sheriff of the county of Norfolk, and his under sheriff, for a contempt alleged to have been committed against the authority of this Court, by having entered on the possession of a receiver acting under the authority of this Court, and wresting from his possession certain goods and chattels, by virtue of a *fiery facias*, issued in the cause of *Bowes* and others against the defendants in the present case. It appeared on the hearing of that motion, that early in July, the order under which the receiver was appointed had been transmitted to the under sheriff in the country. That order had been so transmitted to him without any letter, or any circumstance of direct explanation in regard to the subject of transmission; and he states in his affidavit, that he, having certain transactions with the company in relation to purchases of property, or sales of property, had conceived, for some purposes or other, that that order had been so transmitted to him in relation to those transactions. It is to be observed that he filled the office of under sheriff, and it was much more natural to suppose that a document transmitted to him of that peculiar nature had relation, I think, to his office of under sheriff, rather than to any private transaction of his own, considering that it was sent to him unaccompanied with any explanation, which looked much more in the nature of a public notice than any communication in relation to private business. Such, however, is his statement, and he appears not to have taken the step that would have been prudent; namely, to have transmitted it to the acting under sheriff (as that gentleman does not appear himself to

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have discharged the duties of the sheriff) to have transmitted to those who would be more likely to have occasion to use and to act upon that notice than himself, he not interfering with those duties. However, under the misconception I have stated, he retained the notice, and it does not appear whether or not he took any measures upon it. That took place on the 1st or 2d of July. Upon the 4th of July, a writ of *fiery facias* was received in London, at the office where the business of the shrievalty is carried on—a writ in the cause of *Bowes & others v. The East Anglian Railway Company*. That writ was transmitted and received by the officer on the 5th July, and on that day the officer in communication with the acting under sheriff proceeded to seize the property belonging to the defendants; but immediately that he made his business known, the receiver appointed by this court appeared, and he gave distinct notice to the officer that he was in possession of all the property on the premises where they then were, and he warned the officer against seizing any part of the property, or interfering with his possession. The officer persisted in the seizure of them, and then took certain property, and has ever since remained in possession of that property. It appears that notice was given to the various persons acting under the sheriff, and a most distinct requisition made to restore that property to the receiver under the authority of his appointment by this court. This, however, was disregarded, and the seizure which had been so made was followed up by a summons calling on the receiver to go before a judge of one of the common law courts, there to state the particulars of his claim, and to come and interplead with the plaintiff in the execution, thus taking the officer of this court to give an account of, and to justify his acts to, another court, and seeking to subject him to the order of that other court in the execution of his duty as an officer of this court. That summons, it appears, was attended by the receiver, who had acted on that occasion most properly. He appears to have stated, “I am the officer of the Court of Chancery. I deny the authority of your Lordship or of this Court, and I look to the Court of Chancery to protect me in the execution of my office of receiver.” A course perfectly proper for him to take, and I think he would have neglected his duty to this Court if he had in any way submitted to that jurisdiction. In this stage I cannot help looking at what might have resulted from, and have been, the consequence of that application. Suppose the learned judge had called on the receiver to interplead, and, on his declining to do so, had what is called by the statute barred his claim; what would have been the consequence? It would have brought the authority of this court immediately under the jurisdiction of a Common Law Court, and have occasioned a conflict between the two jurisdictions—circumstances which, each court seeking to maintain its own jurisdiction, no doubt by proper means, would have brought them into a position of extreme difficulty. The summons was not dismissed upon that statement by the receiver, but was only adjourned, keeping the receiver, therefore, under the authority of that summons, so far as it could be done, and that was done after notice of a motion to com-

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mit the parties for a course they had persisted in. The motion to commit was made. The answer given to it was, "True it is that the receiver, at the time that we made this levy, gave us notice that he was in possession of the property as an officer of the Court of Chancery, and acting under its authority; but we thought the order under which he was appointed receiver was an ill-advised, illegal, and indiscreet order; and that, therefore, we were justified in treating it as a nullity, and in despite of the authority of the receiver, seizing the property then in possession of the Court by its officers: and although we have had a notice of a motion to commit, we still persist in holding it; and we now say to the Court, we think that that order ought not to have been made, and therefore we ought not to be interfered with in respect of our opposition to it, and our having ousted the officer of the Court from the possession he had acquired under the authority of that order."

Such was the opposition made to that motion. In the course of the discussion, it was insisted that the order was objectionable in various particulars. It was contended on the other side that it was wholly irrelevant to the application whether the order was or was not such an order as the Court would, on further consideration, deem it right to have made; that it was a subsisting order; that the officer was acting under it when he was interrupted by the sheriff, and that an officer so acting under the authority of the Court was entitled to the protection of the Court; and that if the order was incorrect in a degree which interfered with the legal rights of the plaintiff in the execution, it was open to him to come to the Court to question the propriety of that order in a proper manner; but it was not open to him to question the propriety of that order by disobeying it, and by interrupting the officer of the Court. Such are the grounds on which the objections to the order were made. The case was discussed at considerable length.

The Vice Chancellor appears to have entertained great doubts, and, I think, well-founded doubts, with regard to that order; but he stated, and I think correctly, that that was not the occasion on which the Court could be properly called upon to decide on the validity of the objections to the order; and he therefore declined to express any determinate opinion upon that subject, intimating that they might be proper matters to be discussed hereafter; and with a view of putting the matter in a proper train for discussion, his Honor was pleased to offer to the plaintiffs in the cause, that if they would bring the amount of the levy into court in that case, he would direct the sheriff to withdraw. The parties declined to accede to that proposition; whereupon his Honor was pleased to make the order which has been appealed against, in which he declined to make any order with regard to the execution, and left the sheriff to take his own course as far as that was concerned, and directed that the party should pay to the sheriff his costs of that application, reserving the question as to who ultimately should bear those costs. That order, of course, left the sheriff to act as he thought proper in the seizure which he had made of the property in the possession of the receiver, and directed that

the plaintiff should pay the costs. Now, that order is appealed against, and the same course of argument has been pursued before me as was pursued before his Honor, the justification of the seizure being, that the order was improperly made, and the receiver improperly appointed, on various grounds; but entertaining the same opinion as the Vice Chancellor entertained, that it was not competent or proper for the Court to decide on those objections to the order in this shape, I am of opinion that the sheriff was wholly wrong in entering on the possession of the receiver, and that he is not in a situation to make that defence which he attempted to make before the Vice Chancellor, and has repeated before me. I have looked with care through the various authorities that have been cited, but I do not think it would be a useful occupation of the time of the Court, if I were to go through that very numerous list of authorities. The result of them is this—that it is an established rule of this Court, that it is not open to any party to question the orders of this Court, or to question any process issued under the authority of this Court by disobedience.

I know of no act of this Court which may not be questioned in a proper form, and on a proper application; but I think it is not competent for any one to interfere with the possession of a receiver, to disobey an injunction, or to disobey any other order of the Court, on the ground that such orders were improvidently made; they must take a proper course to question them, but while they exist they must obey them. I consider the rule to be of such importance to the interests of the public, to the peace and safety of the public, and to the administration of the justice of this Court, that it is a rule I hold inflexible on all occasions. I know not how the officer of this Court is to act with confidence in the protection of the Court which he is entitled to, if he is uncertain, if he be a receiver, whether he is justified in taking possession of the property which he is ordered to take; or any other order which can be imagined, and that is executed by an officer of the Court. I do not know how the Court can expect the officers to do their duty if they do it under the peril of resistance. I think it is essential to the dignity of this Court, to its proper administration of justice on behalf of the public and the suitors, that its authority should be obeyed; and if it should be supposed that it has been exercised in a manner inconsistent with law, or inconsistent with the interests of parties, that they should come in upon a proper mode to question that, and that disobedience is by no means the mode for that purpose. On the present occasion, it would have been perfectly open to the plaintiff in the execution to have applied to this Court to be heard *pro interesse suo*, or to have been heard in a summary application for leave to levy under this execution, notwithstanding the possession of the receiver. I know of no instance in which justice may not be conveniently obtained by persons who are supposed to have their rights interfered with by any order or process issued by this Court.

I find in one case that, where a party wished to distrain for rent on property in the possession of the receiver, the Court being satisfied

that the legal right of distress was paramount to the title of the party for whose benefit the receiver was appointed, allowed the distress to be made. I find, in another case, that where property liable to distress had been sold, and the receiver had received the proceeds, and paid them into court, the landlord having claimed a right to distrain while the receiver was in possession, this Court ordered the receiver to pay out of those proceeds to the landlord the rent that was due to him, the receiver being in possession for the benefit of the tenant for life, who was liable for the payment of that rent which was sought to be distrained for on the property in the possession of the receiver. And I apprehend it may be taken as a rule equally general, that, though this Court may have issued a process, though it may have made an order which may interfere with the supposed rights and interests of other parties, not parties to the cause, it is always competent for them to make an application to the Court for relief; and it is not to be presumed or doubted but that justice will be duly administered to them on that application.

It seems to me, therefore, that the seizure in this case was made under circumstances that cannot be justified, I think not excusable, because the gentlemen who take the office of under sheriff are generally men of character, experience, and intelligence, and cannot be supposed competent to discharge the duties of that office, if they are not aware of that rule, which is not confined to this Court, but which is common to all Courts, and essential for all Courts to enforce and to maintain the authority for the benefit of the public at large; namely, to punish resistance and disobedience to their process. I cannot account for the gentleman in this case acting on behalf of the sheriff not being fully aware that if a receiver was in possession of the property, it was not competent to any person to disturb him; still less can I account for their attempting to call on the officer of this court to justify his proceedings in another Court, to bring that officer under the jurisdiction of that other Court, and to bind him in his course of conduct by the orders of that Court, he being amenable, with reference to any circumstances applied to this case, to this Court alone. I am considerably relieved by the course which has been taken this morning. I have been told that the parties by a formal affidavit state that they acted under a misapprehension; and I am told this morning, that as soon as they had the means of correcting their error, they were desirous of submitting themselves to the jurisdiction of the Court, and that they have withdrawn from possession. That undoubtedly may render it unnecessary to take such steps as otherwise might be called for in the case of resistance. The order which is appealed against permitted the sheriff to proceed with his levy. I perfectly agree with the Vice Chancellor, that, on motions of this description, it is always discretionary in the Court what course it will pursue; but I consider that discretion subject to one limitation—that is, to support the authority of the Court, and to support its officers acting under that authority. I cannot consider that this is done, if those who have by force resisted that officer, and taken out of his possession that which he held under the order of

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the Court—I cannot consider that the authority and dignity of the Court is maintained, and the officer properly protected, if those who have so acted are allowed to maintain the fruits of their conduct. I therefore should have no hesitation or difficulty in ordering that the sheriff and his officers do forthwith withdraw, and that they pay the costs of the application to the Court below, that is, without prejudice to any application that the sheriff or the plaintiff may be advised hereafter to make. While I think it my duty to protect the receiver of this Court while he is acting under the authority of the order of this Court, I should also think it my duty to protect the sheriff where he yields obedience to and acts under the authority of this Court.

The order, therefore, that I propose to pronounce on the first application is, that the sheriff and his officers forthwith withdraw from the possession of the goods, chattels, and effects which have been taken under color of a writ of *feri facias* in the cause Bowes and others against the present defendants, the East Anglian Railway Company, and restore the same to the receiver; and that they do forbear all interference and interruption with the possession of that receiver: that they pay the costs and expenses of and occasioned by the seizure, and of the motion before Vice Chancellor Knight Bruce; that the sheriff be enjoined to abstain from all proceedings at law for the purpose of compelling the receiver to interplead; that the plaintiff in the execution be enjoined from taking any proceedings against the sheriff in relation to the property and effects lately seized by him, or any other property in possession of the receiver; that the sheriff do pay the costs in relation to the summons of interpleader: that this order is without prejudice to any application which the plaintiff in the execution may be advised to make to be heard *pro interesse suo* or otherwise in relation to the property in the possession of the receiver, in order that the plaintiff in the execution may suffer no damage by the receiver having been put into possession, supposing it should appear that that possession ought not to have interfered with his right: that the receiver be ordered to keep and retain within the bailiwick, for fourteen days, goods, chattels, and effects, equal in value to those lately seized by the sheriff, not exceeding what would be necessary to satisfy the levy in the said writ of *feri facias*, mentioned and referred to in the affidavit; and if the parties differ about that value, let it be referred to the Master to ascertain it. That is the order which I propose to pronounce in the first case, by which it appears to me that the authority of this Court is maintained in a proper manner, consistent with the rules and practice of this Court. The sheriff is protected, by his obedience to the Court, from any proceedings by the plaintiff in the execution; and the plaintiff in the execution is left at liberty to pursue his rights by a proper application to the Court. As far as I can judge, this is the correct order which I think it right to make on the first application.

Roll. The execution creditor should be paid his costs by the plaintiff, having been served with the notice of motion unnecessarily.

THE LORD CHANCELLOR. I cannot, under these circumstances, give the execution creditor his costs, when I consider the course which he has taken; he might have been entitled to his costs had he only appeared and submitted to the judgment of the Court; but he appeared, and supported the arguments used on the part of the sheriff; in fact, it is clear, that it is the execution creditor who is urging on the sheriff throughout the whole case. To the second application for commitment, it certainly excites my surprise, and I cannot understand, when the parties, by the opinion which has been read, were warned by their counsel, "You are exposed to the censure and animadversion of the Court of Chancery if you do interfere with the possession of the receiver," upon what ground they acted. After that opinion, what would one expect a professional man, acting on behalf of a public officer, to do? They could not and are not to be excused if they were so grossly ignorant as not to know that they might make an application to the Court in such a way as would protect the sheriff. If the sheriff was under a duty towards one Court which was inconsistent with his duty to this Court, they must have been aware of it. They, however, thought fit to treat the authority of this Court, I think, with great levity; they said, "We will take the chance of a contempt of that Court; we shall get through that; but we hold the Courts of Law in such respect that we will not venture to disobey them." If they think fit to do so, they must take the consequences. This Court is not disposed to assume jurisdiction over any other Court; but it is quite as little disposed to yield to it. This Court has to maintain its authority for the benefit of the public; and it can only do that, as I have before said, by supporting its officers in the execution of the orders and processes of the Court, and not allowing disobedience and resistance to be the mode of questioning the propriety of the exercise of the discretion of this Court. I therefore think they acted extremely wrong in making a second seizure while this Court was engaged in considering whether they should be committed to prison for a contempt in having made a former seizure. I do not think there is to be found in the books any case of such a pertinacious resistance to the authority of the Court as that, while the Court is actually considering whether they shall be committed for a certain act, they repeat that act in the face of the Court, and then tell the Court, "Before we did it we took the opinion of counsel, and were told the peril we were incurring." I do not throw out of mind that which is alleged as the excuse; I have given full weight to that; I have given more weight to it than, according to my judgment, properly belongs to it. They say, "It is very true there was a motion to commit for the first seizure, but there was also an order of the Vice Chancellor, which we construe to mean, we had not done wrong in making the former seizure; and we had confidence enough in the knowledge and great experience of the learned judge who pronounced that order to warrant us in entertaining an opinion that that order would excuse what we had done, and that it would be affirmed by the jurisdiction that was afterwards to be appealed to." Now, I give full effect to that, to forbear doing what I should otherwise have felt

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myself compelled to do in the proper maintenance of the authority of this Court, namely, to commit the parties. Allowing, however, the fullest effect to the possible influence which that order may have had in making them take a course foreign to what I consider to have been their duty, and clearly foreign to what is the law, I forbear to act; but in this case, as in the former, the order is that they withdraw. But this seizure was made under circumstances which I can hardly account for, without personal motives having influenced it, and which would deserve severe censure if the existence of those motives were made out to my judicial satisfaction. They find a train just about to start; the passengers are on the platform; the cattle intended to proceed to the London markets are ready to be put in the carriages; and the receiver is under a pledge to the public to start within a few minutes. There is property at that time adequate on the premises, as it is sworn and not contradicted, to satisfy the execution; but the officer saw fit to stop that train. I know not to what pecuniary consequences that may lead; still less do I know, or can I contemplate, what might have been the effect of resistance by the receiver, who would have been justified in resisting it, though he acted most wisely and most prudently in not resisting; yet when I look at the nature of the property, or the circumstances under which it was seized, it does appear to me that it would be dangerous in the extreme if I held out the slightest idea that the sheriff was excusable in the course which he pursued. As I said before, I know not what pecuniary consequences may even yet arise; but whatever they may be, those who did that act must answer it, and I shall take a course which will retain a security upon them to make them amenable for those consequences. The order in this, therefore, is, as in the former application, that the sheriff and his officers withdraw, and that they pay the costs of and occasioned by the seizure and detention which occurred. There is a like injunction against any proceedings at law against the receiver to compel him to interplead, or otherwise, in respect of the property in his possession; and in that case I cannot give the sheriff the protection by this order as I did in the former, because the execution creditor is not before me. It is open to him to make any application for protection, provided the execution creditor shall rule him to return the writ, or take any measures to make him amenable in respect of the property so seized; and this order is made without prejudice to any application which the sheriff or the execution creditor may be advised to make, and the receiver is to retain the goods within the bailiwick for fourteen days, as in the first application. And I further order that the application for commitment in this case stand over till the second day of next Term, in order that it may be seen in the mean time if any thing has occurred which may have subjected the receiver or the company to peril by reason of the conduct which the sheriff has pursued. This order is therefore without prejudice, in the same manner as the first, with a reference to the Master as to the value, if it should be necessary. There is but one case which has been mentioned which at all suggests that it was competent to the parties to justify what they did by objections to the

order, and that case is a case of *Drewry v. Thacker*, 3 Swanst. 529. Supposing the expressions in that case to be accurately reported, and to have the effect which is contended for, I cannot think that it is consistent with the general course of authority; but I do not think it is open to the meaning which the learned counsel has thought fit to ascribe to it. It appears that an action had been brought against an administrator; that the administrator had pleaded pleas, upon some of which the plaintiff would be entitled to a judgment *de bonis propriis*; and that afterwards an agreement was entered into by which the parties severally bound themselves not to make any application to the creditor to stay proceedings in the judgment, notwithstanding a bill was filed and an injunction was obtained, and when the cause came before the Court on a motion for a breach of that injunction, to commit the parties, in the course of a long discussion it appears the Lord Chancellor, in that case, p. 546, used this expression: "On a full explanation of the facts, there might have been a difficulty in granting that application. That was an application to enjoin the creditor from proceedings at law, the suit being a suit for the administration of the assets, and the action at law having a judgment upon a count which entitled the party to a judgment and execution against the assets of the testator. The learned judge therefore says, "On a full explanation of the facts, there might have been a difficulty in granting that application. The order, however, has been made, and must be obeyed." So that there is a distinct statement, though there is an intimation of opinion that the application for the injunction would not have been granted if the attention of the Court had been called to the facts. Yet it says, "The order, however, has been made, and it must be obeyed." Then comes the expression relied on — "But on an application against persons guilty of a breach of it, the Court would forget its duty if it did not give to them the benefit of the fact that the order ought not to have been made." Well, but what is the benefit of the fact that the order ought not to have been made, if, though it ought not to have been made, it must be obeyed? All I can understand is, that the Court, in administering punishment, would attend to all the circumstances of the case, and, amongst others, the circumstances under which the order has been made; but that is not at all intended to impugn the general principles that are laid down, that an order once made by this Court must be obeyed. I can only understand the meaning of the words "must be obeyed" as intended to state, if it is not obeyed, the party shall be liable to punishment. That is the only case that appears to me at all to warrant the idea, which, I think, would be extremely dangerous if at all sanctioned, or any doubt cast on the general principle, that orders made by the Court, injunctions granted, or process issued, must not be resisted on any ground of objection to the exercise of the discretion under which the Court has acted in issuing its process; it must be obeyed, and a proper application made to the Court to question the propriety of it, if the party thinks it improperly made. I have given this case a great deal of attention, and I have read through all the affidavits as far as I have been able. I think I have

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only to maintain the jurisdiction of the Court in the degree which the interests of the public require, while I am at the same time consulting the interests of the parties.

LANDER v. WESTON.¹

November 2, 1850.

Leave to amend.

The plaintiffs, having amended three times, excepted to the answer. The exceptions were disallowed by the Court. The plaintiffs entered a caveat with a view to appeal, but finally abandoned their intention to appeal, and a year after the answer had been found sufficient, applied for leave to amend on the usual affidavit:—Application refused.

THE original bill in this cause was filed in December, 1846, and was amended three times, the last time being on the 15th February, 1849. The answer of the defendant, Robert Henning Parr, having been put in, the plaintiffs excepted to it, and some of the exceptions were allowed by the Master. The defendant excepted to the Master's report, and his exceptions were allowed by the Vice Chancellor of England on the 3d July, 1849. The plaintiffs entered a caveat against the inrolling of this order, alleging their intention to appeal. On the 3d May, 1849, the plaintiffs had amended the bill, and the defendant had answered. The answer was excepted to, and the exceptions disallowed by the Master on the 25th June, 1850. On the 4th July, 1850, an application by the plaintiffs for leave to further amend their bill was made, supported by an affidavit that the amendments were signed by counsel, were not for the purpose of delay or vexation, and were material to the case of the plaintiffs. This application was refused by the Master, with costs. The plaintiffs now moved that the Master's order might be discharged, and that the plaintiffs might be at liberty to amend. The plaintiffs had not proceeded with their appeal, but it was stated at the bar, that on account of the delay occasioned by the illness of the Chancellor, the plaintiff had ultimately abandoned his intention to appeal, and now wanted leave to amend.

Stuart and Welford, for the motion, relied on the 67th Order, 1845.

Bethell and Freeling opposed. It ought to appear that due diligence had been used by the plaintiffs; whereas nothing had, in fact, been done from July, 1849, to June, 1850.

Stuart, in reply.

ROLFE, V. C. It appears to me that the Master has come to a

¹ 14 Jur. 949.

Bickford v. Chalker. — Marshall v. Davies.

right conclusion. The 67th order has reference to a special case for leave to amend, and states certain matters, without which the Court has no power to give leave; but it does not follow, that because the Court cannot give leave without them, therefore it must give leave with them; and therefore the question is, whether the plaintiffs have shown circumstances which would justify the Court in giving them what they have asked for. Though they have stated that the amendments are signed by counsel, and not for the purpose of delay, yet I should be glad to hear why they have not taken steps before. It has been stated at the bar that an appeal was pending, but there has been no affidavit that the appeal was a *bonâ fide* appeal. The plaintiffs, therefore, having a sufficient answer on the 3d July, 1849, lie by, and do not make any application for twelve months. I concur, therefore, with the Master in thinking it not reasonable that they should have further leave.

BICKFORD v. CHALKER.¹

November 8, 1850.

Claim — Receiver.

On a common claim, a receiver ordered at the hearing.

THIS was a claim, in the common form, by a residuary legatee against the executors, for an account.

Bazalgette, at the hearing, asked for a receiver.

J. H. Palmer, for the defendants, objected, that the claim was not a special claim, and that it did not ask for a receiver.²

ROLFE, V. C., made an order for a receiver.

MARSHALL v. DAVIES.³

November 8, 1850.

Claim — Evidence.

At the hearing of a claim for specific performance, the original contract must be proved and produced.

THE claim in this case was filed for specific performance of a contract, and now came on for hearing.

¹ 14 Jur. 997.

² Where it was not asked for by the bill, the Court refused to grant a receiver at the hearing. *Barlow v. Gains*, 8 Beav. 329.

³ 14 Jur. 997.

 Ollendorff v. Black.

Bethell, for the claim, read the usual affidavit filed in support of it.

E. J. Smith, for the defendants, did not admit the contract, and submitted that the contract or agreement must be produced, and regularly proved, before a decree could be made.

ROLFE, V. C., was of opinion that the original document must be proved, and produced for the inspection of the parties at the hearing, in all cases where the defendant disputed the making of the contract. — *Stand over for production of contract.*

OLLENDORFF v. BLACK.¹

December 9 and 10, 1850.

Copyright — Alien — Publication — Residence in England.

An alien author first published a literary work while resident in this country. An edition of the same work was published at Frankfort-on-the-Maine, and copies were imported into this country, and sold by a London bookseller. The alien filed a bill for an injunction to restrain the sale, and, on motion, the same was granted, the plaintiff undertaking to bring an action if the defendants desired it.

THE bill in this case stated, that the plaintiff, Henri Godefroy Ollendorff, had composed a new work, entitled "A New Method of Learning to Read, Write, and Speak a Language in Six Months, adapted to the French, for the Use of Schools and Private Teachers; by H. G. Ollendorff, Ph. Dr., Professor of Languages," which he first published in London in the month of April, 1843, in one volume octavo: that he was entitled to the sole right of printing, publishing, and selling the same for such time as is provided by the statute of the fifth year of her Majesty, intituled "An Act to amend the Law of Copyright:" that great numbers were sold, both of the first and second edition, and a great demand existing for a further supply, he entered into an agreement in March, 1848, with the other plaintiffs, Messrs. W. C. H. Hood, W. J. Hood, & R. Gilbert, carrying on business as booksellers and publishers under the style or firm of "Whitaker & Co.," whereby he (Ollendorff) granted to them the right to print and publish two editions, of 5000 copies each, and such number of the Key to the same work as might be required for such editions, for which he was to be paid an amount equal to one seventh of the selling price, the amount to be paid on the publication of each edition, and to have sixty-three copies of each edition of the Method, and twenty-five copies of each 1000 of the Key; that Whitaker & Co. published an edition of the Method at 12s. each copy, of which edition many copies were unsold: that Alexander Black, of 8 Wellington Street North, a bookseller, had imported a

¹ 14 Jur. 1080.

Ollendorff v. Black.

pirated edition, purporting to be published at Frankfort-on-the-Maine, and sold the same at 5s. 6d. each copy, bearing the same title as the plaintiff's book, but with the addition, "A New Edition, to which is added, a complete Treatise on the Gender of French Substantives:" that the plaintiff gave Black notice to desist from further sale, which he had disregarded.

It was therefore prayed, that Black might be restrained from further selling the pirated edition, and that all copies of it might be delivered up, and that an account of the copies sold might be taken, and the profits of the same accounted for to the plaintiff, Ollendorff, and his publishers, the other plaintiffs. The original bill was filed on the 5th November, 1850, and the defendant, Black, having become bankrupt, a supplemental bill was filed on the 11th of the same month, bringing the official assignee before the Court, no other assignee having then been chosen. The plaintiff, Ollendorff, by his affidavit in support of a motion for an injunction, swore that he had caused his said book to be entered in the register of the Stationers' Company, and, as he believed, had otherwise complied with all the requisites required by the law to enable him to take proceedings for the protection of his said copyright. In another affidavit he swore as follows: "I first published the same in London on the 25th April, 1843, and not elsewhere; and at the time the said work was so published, and for some time previously thereto, I personally resided at No. 23 Titchbourn Street, Westminster, in the county of Middlesex, living and sleeping there; and I continued so to reside for sometime after such publication, and do from time to time continually reside there, as my occasions may require."

The other material affidavits in support of the plaintiff's residence in England were those of Maria Starie, proprietress of the house in Titchbourn Street, and of Mary Ann Shepard, the sister of Mrs. Starie's late husband. The former swore that Dr. Ollendorff first occupied apartments there in 1838: that ever since 1839 he had been in the habit of residing in this country for the space of two or three months in each year: that the plaintiff, Dr. Ollendorff, was the author of various works, and among others of the work in question: that on the occasion of his publishing his first work he resided at that house, and continued to reside there until after the publication of the said work: that, to the best of her belief, whenever the plaintiff, Dr. Ollendorff, published any work in this country, he always resided and continued to reside at the residence aforesaid during and until after the publication of such work: that Dr. Ollendorff was in England, and resided at her house, during all the month of April, 1843, and that he "is now a yearly tenant of mine." Mary Ann Shepard swore that Dr. Ollendorff went to reside at 23 Titchbourn Street, in March, 1838, and continued to reside there till August in the same year; and that since 1838 he had been in the habit of coming to such house, and had usually resided there for a period of three months, or thereabouts, in each year. These two affidavits were sworn on the 3d December, 1850. The principal affidavits in opposition were those of the defendant, Black, and that of the clerk to his solicitor: the former said he believed Ollendorff was the composer of the work,

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and that the same was published in London, in the month of April, 1843; that he had been informed and believed, that at the time of such publication, Ollendorff was, and that he then was, an alien resident at Paris, in France: that he believed, that in consequence of Ollendorff being an alien, and not having been resident within her Majesty's dominions at the time he so published his work, he did not then become, nor had he ever since been, entitled, as author thereof, to the sole right of printing, publishing, or selling the same, or to all the benefit or advantages arising therefrom: that in the year 1843 the said work was reprinted at Frankfort-on-the-Maine, and that since that time various reprints of such work had been published at the same place. The clerk swore that Mrs. Starie, the landlady, told him, on the 25th November, that Dr. Ollendorff had only once or twice in every year from 1839 made a stay in the house for a period seldom or never exceeding a fortnight; and that she always understood and believed that he resided on the Continent, and only visited this country occasionally, and only lived in apartments occupied by him for such periods of his stay, paying weekly rent for the same: that she believed he had no place of residence in this country until a short time since, when he hired a room in her house for six months, but that he had only occupied the same under such last-mentioned hiring for a short time, and had then left this country for the Continent. An interim order for the injunction was made, and the motion came on the 25th November, when it was ordered to stand over for further evidence as to the residence of the plaintiff Ollendorff in England at the time of the publication. The above-mentioned affidavits of the plaintiff himself, of Mrs. Starie, and of Mary Ann Shepard were accordingly made.

Matins and *Flather*, for the motion. So far as the residence of the author in this country at the time of the publication of his work, the affidavits are now clear and satisfactory; and that the first publication took place in England is not denied; indeed, the affidavits in opposition, though they do not speak of the first publication, admit a publication in England. The case of *Boosey v. Purday*, 4 Exch. 145, s. c. 18 Law J. Rep. (N. S.) Exch. 378, (which conflicts with former decisions of the other common law Courts,) will be relied on as an authority in opposition to the case made by the plaintiff. Upon examining that case, it will be found that all the Court of Exchequer decided was as to the right of a foreigner residing abroad at the time of the first publication of his works in this country. The learned judges did not there decide that a foreigner cannot have copyright at all in this country. The domicile of Dr. Ollendorff was not an English domicile, but he resided occasionally in England; sometimes he went to Paris, sometimes to Berlin and other cities, as his occasions required. The contention of the defendants seems to be, that, circumstanced as is this author, he is not to be protected in his property of this description because he is a foreigner. The law cannot be considered as settled by the decision of the court of Exchequer in *Boosey v. Purday*, although it be the last decision on the question, because a writ of error has been brought.

[*Knight Bruce, V. C.* — Then I suppose it will be contended, that if the infant child of alien parents born abroad, having no particle of British blood or descent, be brought to this country at two years old, passes his life here, conforms to the manners and customs of the country of his residence, and so doing writes and publishes a literary work, he is not protected.]

Roll, for the defendants. In the case put by the Court, the domicile would be English. [*Knight Bruce, V. C.* — Not necessarily so; he might not have been domiciled here.] The order asked in the present case is very different from that made by this branch of the Court in similar cases. Such were the cases of *Murray v. Bohn*,¹ and *Murray v. Routledge*,¹ both of which came on and were heard together. Here a gentleman came to this country for a few days, saw his bookseller, and then departed; and on that visit for a day, it might be, claimed a right to the same protection as a native. Such is not the law as it stands, and such was never the intention of the Legislature. In the cases before this branch of the Court to which I have alluded, Mr. Washington Irving, the alleged piracy of one of whose works was the question in dispute, was resident in this country when the work in question was first published. [*Knight Bruce, V. C.* — It may be so, but that fact was not brought under my attention; I merely decided that the matter should be sent to a Court of law.] In those cases the order made was, that the motion should stand over, the plaintiff to be at liberty to bring an action. Here the plaintiff asks for an injunction. The distinction is now attempted for the first time. To support it, it must be said that a foreigner sleeping here for a week or a month, and during that time publishing a work, is to be protected, whilst a foreigner who remains abroad, and sends his manuscript by post for the publication, is not to be so. The question of domicile is not so clear as to induce the Court to aid the plaintiff's legal title, until the question of that legal title, if he has any, has been tried in an action. The legal title cannot depend on circumstances of such a trifling description as the mere residence of a foreigner at a particular time. Until the case of *Boosey v. Purday* is reviewed in the Exchequer Chamber or the House of Lords, the law on this subject, the plaintiff says, is in a state of uncertainty; but the defendants insist that it is right, and must be so considered till reversed. Moreover, it is the last case, and in it the other previous cases are reviewed and carefully considered. To justify the Court in interfering in the manner asked, it should be shown that the right of the party asking its interference is reasonably — I do not say absolutely — clear. [*Knight Bruce, V. C.* — That rule would overturn all that the Court has acted on in patent cases for more than a century. Suppose an Englishman acquires a foreign domicile, and comes back to this country and publishes a book, can he not be protected?] As to patents, length of user is an important ingredient. As to the other point, the Englishman so situated would still be a natural-born subject of this country, and subject to his natural allegiance, of which he could not divest himself. All the allegiance a

¹ Not yet reported.

Ollendorff v. Black.

foreigner owes while temporarily here is one of police. He is protected while here from injury, and owes during such time an allegiance to the Crown. [*Knight Bruce*, V. C.—A foreign minister does not change his domicile, however long he may stay in another country to which he is accredited. If he published a work, would he not have a copyright in it?] The Copyright Act was not intended to encourage foreign authors. The recital of the act is, that it is expedient to encourage learned men to write books, manifestly meaning the subjects of the realm. Had foreign authors been intended, they would have been spoken of in the act. The authors intended were English and other native authors, and the literature, the literature of this country. [*Knight Bruce*, V. C.—Can any conclusion be imagined more injurious to literature in general than the decision in *Boosey v. Purday*? Surely, literature is of no country, and the object of the act of Parliament must have been to promote learning generally. That decision is an unfortunate one for literature in this country; for, is it not a benefit that the learned men of other countries should publish their works here?] I contend that Parliament only intended to legislate for the subjects of this country, and did not intend to confer equal rights on foreigners. If all persons were intended to be protected, why were those excluded who first publish their works abroad? Such have been held to be unprotected, and that is a clear proof that every person was not intended to be protected. The International Copyright Acts show that when foreigners are intended to be benefited, they are expressly named by the Legislature.

Eddis, on the same side. It is of great importance to notice that this is the first case in which an alien has attempted to support, or rather assert, a title to copyright in this country. In every case which has hitherto been brought before the Court, the party claiming its protection of his right has been a native of this country, deriving his title by purchase from a foreigner of his unpublished manuscript. It is conceded that the right which all authors of British birth have to the sole advantage of unpublished manuscripts of their own composition, equally belongs to an alien in respect of such unpublished manuscripts, of his own composition. Such manuscripts, whether belonging to a native of this country or to an alien, no one, without leave of the owner, has a right to publish. When, however, an alien sells this right to publish his work to an Englishman, it is but reasonable and proper that a subject of this country, so acquiring the right, should have a title to come to the Court to have such his purchased right protected. In this case the person complaining is a foreigner, claiming the right to protection which exists only under the Statute Law, which law was passed for the sole purpose of benefiting subjects of the British Crown. The great object of the International Copyright Acts was to induce other countries to give English subjects corresponding rights in foreign countries; but the effect of holding an alien to be entitled to the protection of the general Copyright Acts in this country would be to reduce the benefits held out by the International Copyright Acts to a nullity, as an alien, the subject of a country which

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had not availed itself of the International Copyright Acts, could, by a simultaneous publication of his work in his own country and in England, obtain precisely the same protection as if he had belonged to a country which came within the provisions of the International Acts.

Malins was not called on to reply.

Dec. 9, 1850. KNIGHT BRUCE, V. C. My belief is, that when the cases of *Murray v. Bohn* and *Murray v. Routledge* were brought before me, the point whether the injunction should be granted or refused was not argued, or was scarcely argued; by which I mean, according to my impression, it was not pressed upon me. It was in substance conceded, or almost conceded, by the counsel for the plaintiff, that the matter might go to law, the defendants being directed to keep an account. If, however, the point had been fully argued before me, and substantially contested on that occasion, I should still not hold myself bound by what took place in either of those cases. Notwithstanding what I did, or declined to do, in those cases, I consider myself at liberty to deal with the present case as if those cases were not, and I shall do so. It has been said here that the legal right is doubtful — that the mere existence of the doubt is sufficient to prevent the Court from granting the injunction. In that I do not agree. I believe that doctrine to be new in this Court; for it would interfere theoretically and practically with its jurisdiction, daily exercised to a very great extent. The question of the legal right being in doubt is a matter for the serious attention of the Court, and one to which it is right that weight should be given; but it is not a matter which renders it incumbent on the Court to refuse the injunction. The Court must be guided by a discretion exercised according to the exigencies and the nature of each particular case. Now, notwithstanding Mr. Eddis's argument, which he very properly put, that the plaintiff in *Cocks v. Purday*, 17 Law J. Rep. (N. S.) C. P. 273, s. c., 5 C. B. 860, 6 C. B. 69, was an Englishman claiming by assignment from a foreigner, I still think that circumstance affords no clear ground of distinction between that case and the present. It appears to me, if the case of *Cocks v. Purday* was rightly decided, that the plaintiff, Dr. Ollendorff, is right here in equity and right at law in the present instance. But it has been said, and I believe correctly said, that the case of *Cocks v. Purday*, which was before the Court of Common Pleas, and afterwards before the Court of Queen's Bench, has been opposed by a case in the Court of Exchequer, and I believe they are in opposition. But this circumstance does not render it incumbent on this Court to follow the decision in the Court of Exchequer, however it may tend to throw doubt on the legal question, and therefore may be material as affecting the manner in which the Court is to exercise its discretion. I think it right to say, if I were to elect between *Cocks v. Purday* and the case in the Exchequer, I should be disposed to say — I am disposed to say — and I do say, *Cocks v. Purday* appears to me to be consistent with an enlarged view of the subject, and with the true interpretation of the act of Parliament. That point, however, is not for my ultimate de-

Hayward v. Price.

cision now. I state merely my view of it as a circumstance entering in some degree into my reasons for the course I at present mean to take. There is a circumstance, however, here, which distinguishes the present case from the case in the Court of Exchequer, *Boosey v. Purday*, namely, that when the first publication of the work in question took place in England, the plaintiff Dr. Ollendorff was himself present in England. It is said, and I believe with truth, it was only temporarily, and that his domicil was originally foreign, and has never ceased to be foreign. That may be so. I cannot, however, accede to the proposition, that the circumstance of his being present here at the time of the first publication is immaterial. Assuming *Boosey v. Purday* to be law — though I think *Cocks v. Purday* to be a more correct view of the law — assuming, I say, *Boosey v. Purday* to be law, there is the circumstance of difference to which I have just adverted — a circumstance which ought to have weight on such a question and on such a point. I am of opinion that there is a case for an injunction now. Take an injunction on the common undertaking of the plaintiff to abide by any order which the Court may make as to damages, in the event of the injunction being discharged, dissolved, or varied. I make this order merely as a lawyer; but, for the sake of literature generally, this ought to be the right view of the law. Let an injunction issue at once.

December 10. KNIGHT BRUCE, V. C., stated that it was to be part of the order that the plaintiff must undertake to bring an action, if the defendants, or any of them, should require it.

HAYWARD v. PRICE.¹

November 9, 1850.

Claim — Adding Parties.

A motion for leave to add parties in a claim does not require notice.

A CLAIM had been filed by a second incumbrancer, to redeem a former incumbrance. At the hearing an objection was taken for want of parties, and it stood over, with leave to add those parties. Notice was afterwards given to the plaintiffs that two other persons were necessary parties, and the plaintiffs made a motion as of course for leave to add them also. The registrars declined to draw up the order, suggesting that the motion ought to have been made on notice.

Heberden now mentioned the matter to the Court, and cited *Brattle v. Waterman*, 4 Sim. 125, as to the old practice of amending in order to add parties.

BOLFE, V. C., thought the motion did not require notice.

Bell v. Bell.

BELL v. BELL.¹

December 7, 1850.

Dismiss — Action — Certificate.

Where a motion for an injunction is ordered to stand over, with leave to the plaintiff to bring an action, the plaintiff is not bound to bring his action till the defendant applies to the court.

The Court requires the registrar's certificate to prove the filing of an answer.

THE bill in this case was filed on the 19th March, 1850, to restrain the infringement of a patent, and on the 8th May a motion for the injunction came on to be heard, when an order was made that the plaintiff should be at liberty to bring an action at law, and that the motion should stand over. The answer was filed on the 6th June, and nothing had been done by the plaintiff since that time. The defendant now moved that the bill might be dismissed for want of prosecution.

Rolt and *Selwyn*, for the motion.

Bethell objected that there was no certificate or evidence that the answer had been filed.

Rolt said it was not usually produced till the order dismissing the bill was to be drawn up, and contended that the Court had its own records always before, and must be cognizant of them.

ROLFE, V. C., however, was of opinion that there must be evidence that the answer had been filed on the day mentioned, and the motion stood over a short time for the certificate to be obtained. The certificate having been produced, —

Bethell contended that a year must be allowed to bring the action, as is always done on a decree retaining a bill, with liberty to bring an action. The Court refused to make an order in a similar case.²

¹ 14 Jur. 1129.

² *HEATH v. UNWIN*. Jan. 24, 1849. Before the VICE CHANCELLOR OF ENGLAND. The bill in this case was filed before the Orders of 1845 came into operation, to restrain the infringement of a patent. A motion for an injunction was made, and the bill was on it ordered to be retained, with liberty to bring an action. The plaintiff issued his writ, and the defendant appeared, but the plaintiff did not deliver his declaration for more than four months, after which time no declaration in that action could be delivered.

Lloyd now moved that publication might pass within a month, with a view to having the bill dismissed if the plaintiff did not then proceed. *Wheatley v. Wheatley*, 7 Beav. 577.

Bethell and *Chichester* opposed.

VICE CHANCELLOR. The bill, as I understand it, was filed for no other purpose than to get relief for the infringement of a patent, and because it is such a matter,

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Selwyn, in reply. The plaintiff has allowed more than a reasonable time to elapse, and has done nothing. The bill should be at once dismissed.

ROLFE, V. C. I cannot think a reasonable time has elapsed till the defendant applies. Now he applies, and the only order I can make is, that the suit be dismissed, with costs, unless the plaintiff brings his action before the 1st January. *The plaintiff to bring his action before the 1st January, and to deliver his declaration within a week after appearance, otherwise the bill to be dismissed, with costs. Plaintiff to pay the costs of this motion.*

THE SHREWSBURY AND BIRMINGHAM RAILWAY COMPANY v. THE LONDON AND NORTH-WESTERN RAILWAY COMPANY, and THE SHROPSHIRE UNION RAILWAYS AND CANAL COMPANY.¹

July 24, 25, 26, and 27, and December 2, 1850.

Injunction — Legal Title.

Injunction dissolved, plaintiff's legal title being doubtful, and the continuance of the injunction being unnecessary for the protection of plaintiffs, and injurious to the defendants.

THIS was a motion, by the London and North-western Railway Company, by way of an appeal from an order of the Vice Chancellor of England, granting an injunction against that Company on the application of the plaintiffs. The case is reported, upon demurrer, 14 Jur. 921, where the facts of the case and the arguments are stated. The arguments on the present motion were identical with those used on the former occasion.

Bethell and Follett, for the appeal.

as that under the old Orders, nothing further can be done. In the year 1847, a motion was made for an injunction, and the Court, seeing that the mere object was to have the right determined at law, made an order that the bill should be retained, and the plaintiff be at liberty to bring his action, and that order is still subsisting. The plaintiff began his action, and the defendant entered an appearance, and there the matter rests. It is said, that, by the rules of the Court of Common Pleas, the time has now passed within which a declaration can be delivered, and that there is an end of the action; but it appears to me, that, before I can interfere on behalf of the defendant, I should at least give the plaintiff an opportunity of showing whether he can go on with the action, or will go on with it. Before I make any order, I should like to know what validity and what effect can be given to that order for proceeding to an action. This motion must, therefore, stand over till the 1st March, when I shall be informed what was done.

The reporter is informed that the plaintiff commenced and prosecuted a fresh action, and that nothing further was done on this motion.

¹ 14 Jur. 1125.

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Rolt, Malins, and Hardy, contra.

Bethell, in reply.

Dec. 2, 1850. LORD CHANCELLOR. This case comes before the Court by a motion to dissolve an injunction granted on affidavit, before answer, by the late Vice Chancellor of England, by which the defendants were restrained from conveying or carrying any passengers, cattle, goods, luggage, or other matters or things from Shrewsbury or Wellington, or from any point between those places, to any point or place upon the line of the plaintiff's railway, or the Birmingham, Wolverhampton, and Stour Valley Railway, or using the line of the Shropshire Union Railways by Gnosal, or otherwise to compete for any traffic which properly belongs to the plaintiffs, until the further order of the Court. It is to be observed, that the word "traffic" is frequently used here as intending to comprise the various things mentioned in detail, and it is convenient so to adopt it on the present occasion. The question for consideration arises chiefly upon an agreement stated in the pleadings, of which it is the object of this suit to enforce specific performance, and upon the construction of the act of Parliament referred to in that agreement. The questions are many of them purely legal questions, and the equity which must be established by the plaintiffs to sustain the agreement, mainly depends upon these legal questions. It is not necessary that I should enter into a detail of the whole of them. Among others, I may notice the question, whether the agreement itself is a valid agreement in point of law; and, if so, whether the events upon which it was to come into operation between the parties have taken place; and whether the acts which the plaintiffs impute to the defendants, or any of them, amount to breaches of the agreement on the part of the defendants. Among many other things, it is contended that the agreement is entirely void at law, as being contrary to public policy, or as inconsistent with the duties and obligations imposed by the statute under which the respective Companies, the plaintiffs and defendants, are incorporated, and under which they derive their powers. The defendants also contend that the agreement is void for uncertainty; and further, that the agreement, if valid, has not come into operation, and cannot do so until an actual lease shall be granted of all the lines of railway mentioned in the act referred to in the agreement, pursuant and in conformity with the provisions of that statute; and that such has not yet been granted, and cannot be. On the other hand, the plaintiffs insist on the legality and validity of that agreement, and contend, that, as one of the lines of railway from Wellington and Gnosal to Stafford has been completed, and is used by the London and Northwestern Railway Company, the agreement has come into operation, although no lease has been formally or actually granted pursuant to the act, and that they, the plaintiffs, are now consequently entitled to the benefit of the agreement. As it is my intention to give the plaintiffs the opportunity of bringing an action at law, it would be premature for me to express an opinion upon

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these points. It is enough for me now to say that I consider that some of them may be open to considerable doubt, and that they must be decided before the equities involved in this case can be properly administered; and it is convenient and desirable that the parties should have the opportunity of procuring such legal decision in this stage of the case, rather than postponing it till the hearing. It appears, indeed, that, upon the occasion of the demurrer to that bill being argued before Lord Cottenham, 14 Jur. 921, the defendants asked to have the decision of the Court of law upon the legal point in dispute; but his Lordship thought their application could not then be granted, although it might be properly granted at the hearing. Since that time the answer has been put in, and it seems to me, upon some of the matter stated in the answer, that the time has now arrived at which it is proper that the opinion of a Court of law should be taken.

With respect to the best form of proceeding for obtaining a satisfactory legal decision, I think it will be by an action to be brought by the plaintiffs upon the agreement, in which they may allege as many breaches as they may be advised; and the defendants will be able to contend against the legal validity of the agreement altogether, or may also controvert as many of the breaches assigned on the part of the plaintiffs as they shall deem expedient. I have read through the affidavits and the answer, with a view to ascertain if the case could properly be disposed of at the hearing on equitable grounds merely; but I think it cannot be, and that a legal inquiry must at all events be made. It also appears to me that there is no sufficient reason for continuing the injunction, and I do not think that the injunction can be maintained, consistently with the rules by which this Court is regulated in granting injunctions. The injunction is granted in aid of an alleged legal right. That right has not been established at law, and is denied by the defendants; it is unquestionably open to doubt. The injunction will interfere with the exercise of a *prima facie* legal right in the defendants. It is not required, as it appears to me, for the protection of the plaintiffs against irremediable mischief until the hearing. The plaintiffs' interests and rights may be protected by an account being kept by the defendants, such as I propose to require; indeed, I think the plaintiffs may gain by the injunction being dissolved, but can scarcely be damaged, because, if the defendants be restrained in the terms of the injunction, passengers and traffic may be prevented from being conveyed by the defendants' railway, who would never have gone by the plaintiffs' in any event, and which would, therefore, be a loss to both the plaintiffs and defendants; and if the plaintiffs should fail in establishing their equity, there is no mode by which the defendants could be indemnified against such a loss; whereas, if the defendants are not restrained, and keep an account of all passengers and traffic which it is supposed may interfere with the plaintiffs' equity, the plaintiffs, on the establishment of their equity, may be benefited by the result of such an account, although such persons might never have gone by the plaintiffs' railway.

The statement made on the part of the plaintiffs, of the possible

Nott v. Foster.

injury to them, by reason of their own narrow circumstances, by being deprived of the receipt of fares in the interval between the hearing, has not escaped my recollection; but I do not think that the rights of the defendants can be varied by reason of the plaintiffs' peculiar state of circumstances. There is also a vagueness in the terms of the injunction which renders it very undesirable that it should be continued. Whether it is open to uncertainty, such as occurred in the case of *Lord Ripon v. Hobart*, 3 My. & K. 174, it is unnecessary now to inquire, with reference to the view I take of the case. Upon the whole, therefore, the order which I think ought to be pronounced is, that the injunction be dissolved, and the order which directed it to issue be discharged, with liberty to the plaintiffs to bring such action as they may be advised, with the usual directions, and liberty to apply, the plaintiffs and the defendants mutually undertaking to keep the separate accounts specified in the agreement, and the defendants keeping an account of all passengers and traffic conveyed from Shrewsbury or Wellington, or any point between those places, to any point or place on the plaintiffs' line. Such is the substance of the order, which the parties and the registrar will arrange. With respect to the costs of the present motion, I do not think it necessary to make any order, as I have some doubt whether it came regularly before me. The defendants have moved to dissolve the injunction on the answer coming in, and as the answer was not before the Vice Chancellor, this motion appears to me to have very much the character of an original motion, which ought not regularly to have come before me; but having heard the case fully argued, I think it right to decide generally upon the application; and as it has partaken so much of the nature of an appeal, I think I ought not to give the costs. — *Injunction dissolved.*

NOTT v. FOSTER.¹

November 22, 1850.

New Trustees — Account — Decree.

When a trustee retires, and new trustees are appointed by the court, the retiring trustee is entitled to have the accounts taken.

THIS was a claim filed to have new trustees appointed in the place of a retiring trustee.

Renshaw, for the plaintiff.

Rolt, for the retiring trustee, consented to retire on having the accounts taken before the Court, so as to be discharged; otherwise he refused his consent.

¹ 15 Jur. 3.

Smith v. Corles. — Bowker v. Bull.

ROLFE, V. C., at first said that such an account was not incident to the decree made for appointing new trustees; but ultimately the following order was made:—

Usual order of reference for appointing new trustees. The present trustee to assign the trust estate. The Master to ascertain whether any thing was due from the present trustee. Liberty to apply. No further directions reserved.

SMITH v. CORLES.¹

November 5, 1850.

Claim — Pro Confesso — Defendant Absconding.

Where a defendant to a claim is absconding, and out of the jurisdiction, the court will not give leave to proceed to have the claim taken *pro confesso*, or to enter an appearance on behalf of the defendant.

THIS was a claim for foreclosure. It was stated at the bar that the defendant was out of the jurisdiction, and absconding to avoid process.

ROBERTS applied for leave either to substitute service of a summons under stat. 4 & 5 Will. 4, c. 82, s. 2, or to proceed to have the claim taken *pro confesso* under stat. 1 Will. 4, c. 36, ss. 3, 9, or to enter an appearance for the defendant under the 31st order of 1845.

ROLFE, V. C., was of opinion that no person had been pointed out on whom service could be substituted; that there were no provisions made for taking a claim *pro confesso*; and that as the 13th order of May, 1850, only mentioned appearances *by* a defendant, it did not include the case of appearance entered *for* a defendant; and refused leave.

BOWKER v. BULL.²

November 8 and December 2, 1850.

Mortgage — Surety.

A principal and sureties joined in a mortgage of land and bonds, containing powers of sale, and a proviso, that, as between the principal and sureties, the principal and the land should be primarily liable. The principal afterwards mortgaged the land and bonds to the mortgagee for a further advance.

Held, that the sureties were entitled to redeem the land and bonds on payment of the sum secured by the first mortgage.

¹ 15 Jur. 4.

² 15 Jur. 4. 20 Law J. Rep. (N. S.) Chanc. 47.

Bowker v. Bull.

FOR the circumstances of this case the reader is referred to the judgment, in which they are fully stated; in fact, more fully than they could be from the records of the Court, consisting of the claim and affidavits, in which the various documents are very briefly and imperfectly set out. The proviso referred to is as follows: "Provided always, that, without prejudice to any of the rights or remedies of the said John Bowker, his heirs, executors, administrators, or assigns, as between the said Joseph Bull, his heirs, executors and administrators, on the one hand, and the said Susannah Bull, Eleanor Ann Negus, and Sarah Elizabeth Hewitson respectively, and their respective heirs, executors, and administrators, on the other hand, the said Joseph Bull, his heirs, executors, and administrators, should be primarily liable to the payment of the principal and interest moneys intended to be thereby secured; and that the said freehold hereditaments thereinbefore secured, and the copyhold hereditaments thereinbefore described and covenanted to be surrendered, not comprising any copyhold hereditaments devised as therein mentioned, should be primarily liable to answer and make good the said principal and interest moneys."

Rolt and Toller, for the plaintiff, Bowker. The question is, what is the effect of the proviso at the end of the mortgage deed — whether that can apply to the 700*l*. The daughters say it does, and that it is impossible for any one to deal with Bull, except subject to their rights, as sureties, to come in the place of their principal; but that is carefully excluded by the terms of it. *Ireson v. Denn*, 2 Cox, 425.

Bethell and Osborne, for the daughters. It has been admitted that we are entitled to redeem on payment of the 5600*l*. and the 400*l*., and thereon to have a transfer, so far as relates to the estates at March, but not to the drainage bonds. Whenever a creditor takes a security not only on the property of the debtor, but also on that of a surety, and allows it to appear on the deed, he entitles the surety to pay the debt and redeem, and must thereon convey all his securities to the surety. *Hollis v. Middleton*, 1 Turn. & R. 231. All subsequent dealings between Bowker and Bull were made with notice of this. The proviso probably applied to the case of the mortgagee proceeding to sell. *Wright v. Morley*, 11 Ves. 12, was cited.

Shebbeare and Cairns, for other parties.

Rolt, in reply. The notice that there is a surety must be express, and even then the equity of the surety must depend on the circumstances of the case. The equity of the surety is only to arise under certain circumstances; and how far is a person bound by notice of circumstances which may hereafter give an equity?

ROLFE, V. C. This was a claim of foreclosure by the plaintiff, against Mr. and Mrs. Bull and their daughters, as defendants. I took time to consider a single point which was raised in the argument,

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under these circumstances. By a deed of the 3d March, 1843, made between Joseph Bull and Susannah his wife, of the first part, their two daughters and children, Eleanor Ann Bull and Sarah Ely Bull, of the second part, and John Bowker of the third part, reciting the will of Eleanor Warde, under which Mrs. Bull was tenant for life of a certain messuage, called "Westry House," situate at March, in the Isle of Ely, with divers lands adjoining, with remainder, after her death, to her two daughters, the said Eleanor Ann Bull and Sarah Ely Bull, as tenants in common in fee; and also reciting that Joseph Bull was seized in fee of two other estates in March, or had an absolute power of appointing the same, subject only, as to one of such estates, to a mortgage in fee to Ely Stevens for securing a sum of 400*l.* and interest: it is witnessed, that in consideration of a sum of 5600*l.* advanced and lent by Bowker to Bull, and for a nominal consideration, Joseph Bull and Susannah his wife, and their two daughters, conveyed all the above-mentioned hereditaments to Bowker in fee, subject, nevertheless, to a provision for redemption on payment of 5600*l.* and interest on the 3d March, 1844. There was also a covenant to surrender, by way of future security, some copyholds held partly by Mrs. Bull and her daughters under the will of Eleanor Warde, and partly by Joseph Bull in connection with the before-mentioned freehold estates of which he was seized in fee. The deed also recites that Joseph Bull, in right of his wife, was entitled to indentures of assignment of taxes arising from the fee land in March; and then he and his wife assigned these indentures to Bowker, subject to the same provision for redemption on payment of the sum of 5600*l.* and interest. The deed contained a power of sale by Bowker, in case of default in payment of the sum secured, or the interest; and, finally, there is a proviso, that as between Joseph Bull on the one hand, and his wife and daughters on the other hand, Joseph Bull should be primarily liable to the payment of the 5600*l.* and interest, and the freehold and copyhold hereditaments of which he was seized in fee should be primarily liable to the same.

It appears, that in March, 1844, Bowker obtained a transfer of the mortgage for 400*l.*, made originally to Stevens, and he thereby undoubtedly became first mortgagee of all the property for securing 6000*l.* and interest. He is therefore clearly entitled to the ordinary decree of foreclosure of all the property comprised in his securities as mortgagee for 6000*l.* The question arises whether he is entitled to consider himself mortgagee on all or any part of the property for a further sum of 700*l.*, by reason of a deed of the 9th May, 1849, made between Joseph Bull of the one part, and Bowker of the other, whereby, in consideration of 700*l.* paid by Bowker to Bull, Bull conveyed to him, by way of mortgage, all the property comprised in the prior securities of which he was seized in fee, and also the two assignments of taxes.

On the part of the two children it was contended, that Bowker must be postponed to them so far as relates to this latter charge, and I think they are right. The children are, according to what appears on the face of the deed of 1843, mere sureties for their father. Bow-

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ker, when he took his further charge^{*} in 1849, had full notice of this, and therefore could only take subject to such rights as the daughters had acquired by reason of their having concurred in the former deed. Now, it is quite clear that a surety paying off the debt of the principal is entitled to a transfer of all the securities held by the creditor, in order that he may make them available against the debtor, as the original creditor might have done. On these grounds the daughters were certainly entitled, on paying off the 6000*l.* mortgage, to have all the securities, comprised in the deed of the 3d March, 1843, made over to them, in order to enable them to reimburse themselves, out of their father's separate property comprised in that deed, whatever portion of the 6000*l.* they might have been obliged to pay; and this is a demand certainly prior in point of date to the last mortgage. It was urged at the bar, in behalf of Bowker, that this right of a surety is only a potential equity, which, though it may be asserted by the party himself, yet it cannot bind third persons. But I cannot agree to this. The equity gives to the surety a right to call for a transfer of the securities, and so binds these securities, into whatsoever hands they may come, with notice of the charge. It was then further contended that whatever may be the rights of the parties as to the land, yet that the doctrine could not be extended to the indentures of taxes, for that the proviso at the end of the deed, though it stipulated for a priority as to the former, was silent as to the latter. I cannot, however, agree to the proposition that the parties, by expressly mentioning one part of the security, have become bound to forego their rights as to the rest. It will be recollected, that the mortgage contains a power of sale; and the proviso might, perhaps, have had reference to that power; that is to say, all parties might have meant to stipulate, that as between Mr. Bull and his children, the latter should be bound to resort for their indemnity, in the first instance, to the land, and to the indentures of taxes only in the event of the primary fund (the land) proving deficient. Be this, however, as it may, I do not think that the sureties, by expressly mentioning a part of their rights, can be deemed to have waived or lost the entire right given them by the doctrines of this Court. The result is, that there must be the usual decree of foreclosure against all the parties, mortgagors in the deed of 1843, as on a mortgage of 6000*l.*; and in case the sum found due is paid, then if all or any part is paid by the daughters, or either of them, the securities must all be transferred to them, and Bowker can only make his subsequent security available, by redeeming them in the ordinary way. This is the clear opinion I had formed at the hearing; but, as I mentioned in court, my attention was afterwards called by Mr. Lee, as *amicus curiæ*, to the cases of *Barnes v. Racster*, 1 Y. & C. C. C. 401, and *Bugden v. Bignold*, 2 Y. and C. C. C. 377, and also I was anonymously referred to the case of *Higgins v. Frankis*, 10 Jur. 328, and I wished to have an opportunity, before I decided this case, of referring to these authorities. I have now done so, but I see no reason to alter the view of the case which I had previously taken. The two cases reported in *Younge & Collyer* were both cases where the mortgagor had mortgaged different estates to

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various parties — some of whom had claims on one estate only — others on all ; and the question was as to the rights of the different subsequent mortgagees to throw the first mortgagees on particular parts of their securities. But the doctrine there acted on by Knight Bruce, V. C., does not seem to me applicable to a case like the present, of several mortgagors, and where the question is as to the right of the surety's mortgagor against his principal. The case before Wigram, V. C., is in strict conformity, as I understand it, with the principle on which I am now acting, except, indeed, that there Sir James Wigram directed the Master to inquire whether the party was a surety. That would be a perfectly useless inquiry here, and would only occasion unnecessary expense. It is not disputed that Joseph Bull alone is the principal debtor, and that the other parties are sureties. The decree must, therefore, give them a right, as mortgagees, against all the property of Joseph Bull, for whatever they may pay in redeeming the mortgage for 6000*l.* ; and then Bowker will be foreclosed against them, unless on payment of whatever is due to them in respect of what they shall so pay in discharge of the 6000*l.* mortgage. If Bowker redeems them, the decree will go in the usual way to direct an account of the principal and interest due to him on both mortgages, and in default of payment Joseph Bull will be foreclosed.

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December 5 and 9, 1850.

Will — Maintenance — Surplus.

A testator gave his estate on trust to assign the same between his eight children, when they should attain the age of twenty-one, and in the mean time to pay to his wife or otherwise apply the rents and proceeds of the respective shares for or towards their respective maintenance and education ; and there was a direction that, in case of death under twenty-one, the share, with the accumulations, if any, should go to the children who did attain that age : —

Held, that the mother, having maintained the children, was entitled to the rents and proceeds without account.

CHARLES HARWOOD, by will, dated the 7th July, 1841, gave all his estate and effects to trustees, their heirs, executors, administrators, and assigns, “ upon trust, out of the rents and proceeds of my estate and effects, in the first place, to pay unto my said wife an annuity or annual sum of 300*l.* during her life, by equal quarterly payments, the first quarterly payment thereof to be made at the expiration of three months next after my decease ; and subject to and charged with the payment of the said annuity, upon trust to convey, assign, or transfer all my said freehold, leasehold, and other estates and effects unto and equally between my eight children, Hannah, Thomas Charles, Joseph,

¹ 15 Jur. 5. 20 Law J. Rep. (n. s.) Chanc. 75.

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Mary Ann, Emily Elizabeth, Adelaide Eleanor, Rachel, and Ann Louisa, when and as they severally attain the age of twenty-one years: and in the mean time to pay unto my said wife or otherwise apply the rents and proceeds of the respective shares and interests of my said children in my said estate and effects, for or towards their respective maintenance, education, and advancement; but in case of the decease of any or either of my said children, under the age of twenty-one years, then upon trust to convey, assign, or transfer the share or shares of such one or more of them as shall die under that age, and the accumulations, if any, unto and equally between such of my said children as shall live to attain that age: provided always, and I do hereby declare and direct, that it shall be lawful for the trustees or trustee for the time being of this my will, with the consent in writing of my said wife during her life, and after her decease, of their or his own authority, to demise or lease all or any part of my said estate for any term or number of years, either in possession or reversion, and to take any premiums or premium which shall be held by my trustee upon the same or similar trusts as the estate or premises from which the premium or premiums shall proceed." The testator left several children, and his wife, their mother, him surviving, and she married again.

By the Master's report, it appeared that the mother and her husband had received a large sum of money, 5213*l.*, on account of the rents and profits of the real estate with which they were charged, subject to the deductions in respect of the payments made by them for the maintenance and education of the children, amounting to 3478*l.* The cause now came on upon further directions, the question to be argued being, whether the mother was entitled to the surplus rents and profits beyond what had been expended in maintenance and education.

Bethell and *Craig* contended that the surplus belonged to the children. There is a distinction where a legacy is given that a certain thing may be done, and where the thing to be done is merely the motive of the gift. Thus, if a testator gives a fund to father and mother, or husband and wife, that they may better bring up their children, that is only the motive of the bounty, and not the object. In this case the husband was not beneficially interested. The trustees were to pay the *proceeds*, indicating that the trust was in them, to the mother. The mother, on the other hand, was to apply it; she was to bestow her personal care on the children. But when a daughter married, this became impossible. Again, the word "advancement" shows that the trustees were the parties charged with the care of the fund. The mother could not, in the true meaning of the word, provide for the children's advancement. Secondly, the word "accumulations" could only refer to the accumulation of the interest; and this distinguished this case from *Hadow v. Hadow*.

Rolt, for Mrs. Paull, cited *Hadow v. Hadow*, 9 Sim. 438, and *Leigh v. Leigh*, 12 Jur. 907, and submitted that the word "accumulations" referred to the contingency of the mother dying before the children

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attained twenty-one, in which case there must have been accumulations. *Hawkins v. Watts*, 7 Sim. 199, and *Raikes v. Ward*, 1 Hare, 446, were afterwards cited. See *Thorpe v. Owen*, 2 Hare, 611, and the cases there collected.

Stuart, Teed, Rogers, Busk, Smythe, and Gordon, for other parties.

ROLFE, V. C., at the close of the argument, said, that the only point in his mind was on the case of *Hadow v. Hadow*, 9 Sim. 438. He had great difficulty in understanding the distinction that had been pointed out. If, in order to maintain the children, a testator gave the mother 1000*l.*, he showed that he intended her to do her duty. But his Honor would have thought, independently of authority, that a gift like that was a gift for that purpose only, and not a gift to her. But it is decided not to come within that class of cases, and to be an expression of motive only, and to be a gift subject to no account; that is to say, that if she performed her duty in maintaining the children, she was not to be called to account as to the surplus. Supposing that to be correct, his Honor was bound by that decision, and thought there was not any distinction. He did not think that *Leigh v. Leigh*, 12 Jur. 907, varied materially, because there the gift was, "I direct my trustees to pay the dividends to my wife so long as she shall remain my widow, for the purpose of enabling her to bring up the children." That was a motive, and not any trust connected with it. The cases of *Raikes v. Ward*, and *Berkeley v. Swinburne*, 6 Sim. 613, seemed to him to govern it, and, except *Hadow v. Hadow*, he could not distinguish them. The only distinction arises from the words of accumulation, and he did not think that they would avail; but he reserved his judgment.

December 9, 1850. ROLFE, V. C. The only question in this case on which I desired time to enable me to look into the authorities was as to the right of Mrs. Paull, formerly Mrs. Harwood, to the surplus income of the testator's estate, which remained after providing for the maintenance and education of the children. The testator, by his will, gave all his estate, real and personal, to two trustees, upon trust. [His Honor here read the passage from the will.] The trustees paid over the whole income of the estate to Mrs. Harwood during her widowhood, and for about a year after her marriage with Mr. Paull. This suit was then instituted, and a receiver was appointed; but between the time of the testator's decease and the institution of this suit, the income received by Mrs. Harwood, now Mrs. Paull, was more than sufficient to enable her to maintain the children, so that, as appears by the Master's report, a considerable surplus remained in the hands of Mrs. Harwood. The question is, whether that surplus belongs to her or the children? That depends on the construction which is to be put on the clause of the will to which I have already referred. I am of opinion, that, on the authorities, there was no trust here for the benefit of the children, which gave them any interest in the fund paid over to their mother during their minorities, beyond what was

applicable for their maintenance, education, and advancement. I could not come to any different conclusion, unless I was prepared to say that I would not abide by the principle laid down and acted upon in the cases of *Berkeley v. Swinburne*, 6 Sim. 613, and *Hadow v. Hadow*, 9 Sim. 438. In the former of these cases the testator gave his real and personal estate to trustees upon trust, to convert the same into money, and to invest the money on securities for the benefit of the younger children of his two sisters, Henrietta Sophia, the wife of Robert Berkeley, and Caroline Martha, the wife of Grantley Berkeley, to be vested in sons at twenty-one, and in daughters at twenty-one or marriage; and there was a proviso, that during the minority of every such son, and during the minority and discoveriture of every such daughter, the trustees should pay the dividends, interest, and produce of the share of each such child respectively, unto his said sisters respectively, or, in case of their deaths respectively, unto the guardians for the time being of such child respectively, to be applied in and towards the maintenance and education of such child, or otherwise for his or her use and benefit.

The Vice Chancellor of England there held, that the sisters took beneficial interests in the income of their children's shares of the residuary estate. His Honor's judgment is very short, and no reasons are given; but it evidently proceeded on the ground, that where, during the minority of a child, the interest of such child's legacy is directed to be paid to the parent, to be applied for or towards its maintenance, there the direction as to the application is a mere charge for the benefit of the child in what is substantially a gift to the parent, subject to such charge. The other case, *Hadow v. Hadow*, was to the same effect. There the testator, after giving one third of his residuary estate to his son Reginald, and one other third to his son Henry John, to be paid to them respectively on their attaining the age of twenty-one years, proceeds to direct, that until such shares shall be payable to his said sons respectively, the dividends thereof shall be paid into the proper hands of his wife, Jane Hadow, to be by her applied, or in case of her death to be applied to the trustees, for and towards the maintenance, education, and advancement of his said sons, as she or they might think proper.

Here, as in the former case, his Honor held that the testator meant that the wife should have the income of the children's property to maintain them during their minority, without account. It must not be taken that in either of these cases the mother could have appropriated the fund to her own purposes without maintaining the child. That is certainly not the doctrine of the Court, as is pointed out by Wigram, V. C., in *Raikes v. Ward*, 1 Hare, 446, where the subject is fully discussed. The parent, to whom trustees are directed to pay dividends under a bequest like the present, is clearly bound to apply a competent sum in the maintenance of the child or children; and however difficult it may be to decide what is the amount to be applied, yet this Court holds that to be a matter capable of being ascertained, and will compel the parent to do what is right. But I find no authority conflicting with the two cases of *Berkeley v. Swin-*

burne and *Hadow v. Hadow*, which I consider to have decided, that where the interest of the children's legacies is given to a parent to be applied for or towards their maintenance and education, there, in the absence of any thing indicating a contrary intention, the parent takes the interest subject to no account, provided only that he discharges the duty imposed on him of maintaining and educating the children. At the hearing of this case I expressed some doubt as to the propriety of those decisions, and it is but just, therefore, that I should now say, that further reflection has led me to think that my doubts were not well founded. The language in which the gift in this case, and in those to which I have referred, is couched, is, perhaps, not inconsistent with either construction. But it is always extremely improbable that a testator can mean that a parent shall keep an accurate account of all money expended in the maintenance and education of a child, forming, as that child ordinarily does, part of the parent's establishment. The great probability always is, that nothing more was intended than that the parent should adequately maintain and bring up the child; and I have no hesitation, therefore, in following the two decisions I have referred to. My attention was called by Mr. Bethell to the language of the clause in this will, according to which the trustees are directed to pay over to the widow the rents and proceeds of the respective shares and interest of the children, to be applied for or towards not only the maintenance and education, but also the advancement of the children; and, coupling this with the power of sale which is contained in the will, Mr. Bethell argued, that the doctrine contained in the cases before the late Vice Chancellor would not apply, for that here the whole corpus of the property might get into the hands of the parent. But I do not think this makes any difference. In *Hadow v. Hadow*, the same words occurred as in this, with reference to the *advancement*; and I very much doubt whether the word "proceeds," which is found in this will, refers to any thing more than the annual income of the personal estate; but even if it did, the case would not be varied. No doubt, so far as the corpus is concerned, the mother would be a mere trustee, but the doctrine as to income would not, in my opinion, be affected. I stated at the hearing, that reference to the accumulations does not affect the construction; the expression is, "accumulations, if any;" and such a provision was very necessary; for though there could be no accumulations for the benefit of the children while the fund was paid over to the mother, yet it might be different as soon as the trustees, in the exercise of their discretion, should cease to trust the mother, and should themselves provide for the children's maintenance, and they would be mere trustees, and liable to account. The provision as to the accumulations is, therefore, quite consistent with the construction I put on the clause. The result is, that the children are not entitled to any account of accumulations; and therefore Mr. and Mrs. Paull are in no default, and so will have their costs.

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November 21, 1850.

Judgment — Tithes — Receiver.

Where a creditor has obtained a judgment against an incumbent, the Court can, on a case for a receiver being made, appoint a receiver of the profits of the living.

By an indenture, bearing date the 8th August, 1845, in consideration of the sum of 24,500*l.* to the Rev. Michael Augustus Gathercole, paid by William Hawkins, Gathercole conveyed to Hawkins and his heirs, by way of mortgage for the same sum, the perpetual advowson, donation, free disposition, patronage, and right of presentation of, in, and to the vicarage and parish church of Chatteris Nuns, together with the parsonage-house and outhouses, &c., tithes of what kind soever, corn rents, rents in lieu of tithes, &c., and all other commodities, emoluments, hereditaments, and appurtenances whatsoever, to the said advowson belonging. In the same indenture were contained a power of sale, and the usual covenants for payment of the money. By a warrant of attorney for securing payment of the same sum of 24,500*l.* and interest, certain persons were empowered to enter up judgment against Gathercole in the Court of Queen's Bench for the sum of 49,000*l.*, and judgment was accordingly entered up and registered on the 5th September, 1845, and re-registered on the 1st July, 1850. At the time when the above-mentioned indenture was executed, Gathercole was not incumbent of the vicarage, but it appeared, though it was not distinctly stated on the pleadings, that he was immediately afterwards presented; for by an indenture of the 2d September, 1845, made between Gathercole, Hawkins, and G. R. Dodd, after reciting that Gathercole was then the incumbent of the vicarage, it was witnessed, that, for securing the regular payment of interest on the said sum of 24,500*l.*, Dodd was appointed agent and receiver of the income and proceeds of the vicarage, and to apply the money in satisfaction of the interest to become due of the said sum, and pay the residue to Gathercole. On the 29th August, 1849, there was due to Hawkins, for arrears of interest, 1601*l.*, and on the 5th September, 1849, he obtained a writ of *fiery facias*, under which the sheriff obtained 542*l.*, against the goods of Gathercole; and on the 10th November, 1849, a writ of sequestration was issued, at the instance of Hawkins, to the Bishop of Ely, commanding him to sequester the vicarage till he should have levied the sum of 48,522*l.*, which writ was indorsed to levy the sum of 1134*l.* and expenses. It was not distinctly stated on the pleadings, but it appeared that these sequestrations were issued on the judgment before mentioned. The writ of sequestration was published on the 18th November, 1849; and it was stated at the bar, on the 21st November, 1850, that enough had been received under this sequestration to pay 1134*l.* and expenses. On the 19th Janu-

¹ 14 Jur. 1103. 20 Law J. Rep. (n. s.) Chanc. 59.

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ary, 1850, Hawkins filed a bill against Gathercole and Dodd, charging collusion between them, and praying that Dodd might be removed from his office of receiver. In August, 1850, a judgment was obtained by Mr. E. W. A. Gathercole, and Mr. J. Garratt against Gathercole, for 1500*l.*, and a sequestration was issued and published; and in the same month a judgment and sequestration were obtained by Mr. Wisewould, the attorney of Gathercole, for 381*l.* A bill was filed on the 7th November, 1850, by way of supplement to the former bill, stating these facts, and charging collusion between Gathercole and the subsequent incumbrancers, and praying that they might be restrained from executing their sequestrations, and that a receiver might be appointed. Hawkins now moved accordingly that a receiver might be appointed.

Bethell, *Badeley*, and *S. Smith*, in support of the motion. By the 13 Eliz. c. 20, all chargings of benefices, with cure thereafter, with any pension or with any profit out of the same to be yielded or taken, hereafter to be made, other than rents to be reserved upon leases thereafter to be made, according to the meaning of that act, should be utterly void. This act was made perpetual by the 14 Eliz. c. 11, s. 14, and continued to be the law till it was repealed by the 43 Geo. 3, c. 84, s. 10. That act, however, having been repealed by the 57 Geo. 3, c. 99, it has been generally considered that the statute of Elizabeth was revived, and that it is not possible to charge a benefice by law. *Mouys v. Leake*, 8 T. R. 411. *Flight v. Salter*, 1 B. & Ad. 673. *Kirlew v. Butts*, 2 B. & Ad. 736. *Faircloth v. Gurney*, 2 Moo. & Sc. 822. 9 Bing. 622. *Colebrook v. Layton*, 4 B. & Ad. 578. *Moore v. Ramsden*, 3 B. & Ad. 917, *n.* *Salmarsh v. Hewitt*, 1 Ad. & El. 812. 3 Nev. & M. 656. But though a parson could not charge his benefice, yet it always remained subject to his debts, and the profits, after proper provision made for divine service, could be obtained by the creditors. *Bendry v. Price*, 7 Dowl. 753. If the warrant of attorney or instrument on which the judgment is obtained does not profess to charge the living, it will be valid. *Britten v. Waite*, 3 B. & Ad. 915. *Walthew v. Cross*, Exch., November 16, 1850. *Aberdeen v. Newland*, 4 Sim. 281. If the Legislature had intended a judgment not to be a charge, it would have been expressed so; but by the 1 & 2 Vict. c. 110, s. 13, a judgment is expressly made a charge on all, and a receiver is the mode of execution which is used by these Courts.

Malins, *Smythies*, and *Speed* opposed. It is admitted that a deed expressly charging a benefice in the hands of the incumbent is void; but it has been contended, that under the 1 & 2 Vict. c. 110, a judgment is made a charge. It is true that the word "tithes" is to be found in the statute, but that may mean lay tithes. Before this statute was passed, it was not possible to charge tithes in the hands of the incumbent; and that statute only extended the rights of the creditor to the whole instead of half the lands, and not to bring any thing under a judgment which was not so before, otherwise it would

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have been expressed. It never can have been intended to repeal the statute of Elizabeth in this tacit manner; besides, the act of Victoria only makes a judgment a charge on that which the debtor could charge by writing; and this he could not have charged. *Alchin v. Hopkins*, 4 Moo. & Sc. 615. We admit that 1130*l.* is due, but that will soon be paid under the present sequestration; and why should the creditor come here for a receiver? How has the plaintiff shown his right in equity? He has no charge by deed or writing. The bill would be demurrable as an attempt to enforce in equity a charge on a benefice; and no relief can be had on a demurrable bill. A glebe land is not affected by a judgment. *Cottle v. Warrington*, 3 B. & Ad. 447.

Daniel, for one of the other creditors.

Bethell, in reply, was not heard.

ROLFE, V. C., after observing, that, after the long discussion that had taken place, it appeared that the only question to be decided was that relating to the construction of the Imprisonment for Debt Act, said—Now, in this case the facts are these: Mr. Gathercole, being, in the month of August, 1845, the owner of the advowson of Chatteris Nuns, and being about to present himself to the living, mortgaged the advowson for a large sum of money, 24,500*l.*, to the plaintiff. He shortly afterwards presented himself to the living. It does not appear clearly whether the mortgage included the profits of the living; but if it did, nothing turns upon it, for at that time he was not presented, and had them not to dispose of; and for a further security he did that which, upon the authorities, I think it was competent for him to do, without bringing himself within the purview of stat. 13 Eliz. He gave a warrant of attorney to confess judgment for the same amount, upon which judgment was entered up and registered, and the registration was renewed from time to time, which I believe the parties are obliged to do every five years under the act. Now, what right, then, did the judgment creditor acquire by that? What he has done is this—the interest being greatly in arrear, he issued a sequestration, for 1100*l.* or 1200*l.*, the amount of arrears of interest. Whether, under the writ of sequestration, he could take more than the amount of the interest, and whether the judgment would warrant a sequestration for the principal as well as the interest, is a question which I have nothing now to do with—that is between Mr. Hawkins and the subsequent incumbrancer in a court of law.

What Mr. Hawkins says is this—“Independently of my sequestration, I have really, and as the foundation of the sequestration, obtained a valid judgment against Mr. Gathercole.” And what is the effect of that? He says it is pointed out by sect. 13 of stat. 1 & 2 Vict. c. 110, which enacts, “that a judgment entered up against any person shall operate as a charge upon all lands, tenements, rhetories, advowsons, tithes, rents, and hereditaments, of or to which such per-

son shall at the time of entering up such judgment, or at any time afterwards, be seized, possessed, or entitled for any estate or interest whatever, at law or in equity, whether in possession, reversion, remainder, or expectancy, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power, which he might, without the assent of any other person, exercise for his own benefit, and shall be binding as against the person against whom judgment shall be so entered up, &c., and that every judgment creditor shall have such and the same remedies in a court of equity against the hereditaments so charged by virtue of this act, or any part thereof, as he would be entitled to in case the person against whom judgment shall have been so entered up had power to charge the same hereditaments, and had, by writing under his hand, agreed to charge the same with the amount of such judgment debt, and interest thereon." Now, the plaintiff says that the effect of his judgment is, that, as against the profits of this living, he has the same right as he would have had if Mr. Gathercole had had power to charge the living, and had actually charged it; and having that right — I called it, in the course of the argument, and I do not know that I was incorrect, a "legal charge" — having that right, he asks to have it made available in the only way in which it can be made available — namely, by getting what is called an equitable execution, by having a receiver appointed, in order that his charge may be so made available. I presume there is no question as to the right of the plaintiff to file this bill, and have such relief, if, instead of a living, we were dealing with ordinary property; and the sole point is this — prior to this statute, called the Imprisonment for Debt Act, it is said that it was unlawful, by virtue of the statute of Elizabeth, which was repealed and revived, for the owner of a living to charge it; and that it could not have been in the contemplation of this statute, that those who were incompetent to charge property before the statute, should be able to charge it afterwards, because it is said that that was quite out of the scope of the statute.

I entirely agree with that argument, if the meaning is, that it did not authorize him to charge, in the ordinary sense of creating a charge by deed or contract; but I do not accede at all to it, if it is meant to be contended that he cannot charge the tithes, or that the law will not charge them for him, when that is done which the law says shall give to the party the effect of a charge. What right have I to speculate on what the legislature meant, when these words are as clear as words can make it? But if I did speculate, I should not in the least doubt that the meaning was — whether this particular case was within the contemplation of the legislature, I know not — I should not doubt that the object was to make all the property that by any process of execution could be made available by writ to satisfy the creditors — to make it available by turning it into a charge, to be asserted in the ordinary way in which property charged can be made available. That is the short point, and that being so, I have not a word more to say, than that I think the party here is entitled to a receiver.

Cockburn, *Ex parte*.

Ex parte COCKBURN, in re THE ROYAL BANK OF AUSTRALIA.¹

November 14, 1850.

Joint-stock Companies Winding-up Acts—Contributory.

The directors of a joint-stock company passed a resolution in 1840, to take a number of shares among them, and signed letters agreeing to take them. One of them signed a letter for 100 shares, and on a call being made in the following year, he gave his promissory note for the amount of the call. The deed of settlement contained a power for the directors to buy shares. This party in 1842 retired from the direction, and applied to have the 100 shares taken back, which was agreed to, and his letter of application and the promissory note were delivered up to him. An order having been made for winding up the affairs of the company, the Master placed this person's name on the list of contributories in respect of the 100 shares. On appeal, the Court being of opinion that there was no evidence of fraud or unfairness, ordered his name to be taken off.

THIS was an appeal motion, on behalf of Mr. Alexander Cockburn, from the decision of the Master, who had placed the name of Mr. Cockburn on the list of contributories, as a contributory in respect of 100 shares in the Royal Bank of Australia. Mr. Cockburn was one of the original promoters of the company, and a subscriber for twenty shares in 1840, when he executed the deed of settlement. In August, 1840, it was resolved by the directors that a certain number of shares should be taken by themselves or their friends, and Mr. Cockburn signed a letter undertaking to take 100 shares. In the following year, a call of 10*l.* per share having been made, Mr. Cockburn gave his promissory note for 1000*l.* in respect of these 100 shares. In May, 1842, Mr. Cockburn proposed to retire from the direction, and applied to have the 100 shares taken back. Under the 52d clause of the deed of settlement, the directors had power to purchase shares. In July, 1842, after Mr. Cockburn's resignation had been accepted, his letter accepting the shares, and the promissory note for 1000*l.*, were returned to him. The twenty shares originally held by Mr. Cockburn had been duly transferred previously.

Wigram and Goldsmid, for the appellant, cited *Beresford's Case*, 3 De G. & S. 175. 14 Jur. 657, 826.

Malins and W. T. S. Daniel, for the official manager, relied on *Ex parte Hennessey*, 14 Jur. 826, and *Ex parte Stanhope*, 14 Jur. 610.

KNIGHT BRUCE, V. C. I have asked whether there is any evidence of an intended fraud, or of the company's failing, and of Mr. Cockburn's wish to get out of it. That question has been answered in the negative. If any fraudulent and unfair intention in this transaction had been suggested and proved, or were proper to be inferred, that would be very material, and it would be a different case from that which is before me. In the case before me, I must assume a total absence of fraud and of unfair intention. Then it is this, that

¹ 15 Jur. 28.

Cockburn, *Ex parte*.

a director of the company, who is also a shareholder to the extent of 100 shares, desires to withdraw from the directory, and at the same time desires to relinquish his connection with the company, by disposing of his shares, or parting with them, or having them taken off his hands; and I infer, when he communicated his wish to resign the directorship, he stated that desire also, but I do not infer that it was matter of corrupt bargain, or that it was matter of bargain at all. I infer that his retirement from the directorship was absolute and unconditional. Coupled with an intimation which might or might not have been rejected, or have effect given to it, he desired to have his shares taken off his hands: in those circumstances, he entirely severed from the directorship on the 22d June, 1842; and after this complete and unconditional severance, the suggestion previously made by him was taken into final consideration, and on the 6th July, accepted by a body of directors, of whom he was then one. The effect of it is, that the directors took the shares and gave back to him his promissory note. That being so, I apprehend, that, by the 35th and 52d clauses of the deed, or by one of them, not only is this case positively distinguished from *Col. Stanhope's Case*, but the transaction is to be regarded as altogether different. I apprehend the directors had a right to enter into that contract, Mr. Cockburn not being one of them, and his retirement having been, as I infer it to have been, unconditional. But, it is said, the forms and ceremonies attendant upon a transfer were not pursued, and no transfer was executed. In my opinion, that omission did not invalidate the transaction. If Mr. Cockburn had been required to execute such a deed, it is to be supposed that he would have done it. He was not required, and that omission, however irregular it may have been, on every ground of ordinary fairness, cannot invalidate the transaction as against him, if he was not both vendor and purchaser — if he was not director. I think it is to be inferred that he was not; and the omission of that form and ceremony is, as far as he is concerned, immaterial. Now, he is placed on the list as owner of 100 shares absolutely. But before I can direct him to be removed generally, I must know whether there is a clause in this deed, as there has been in some of the deeds of some of the companies, that a shareholder transferring shall be, as between him and the company, exempt from all demands up to that time. If there is such a clause, his name ought to be taken off the list altogether. [Counsel on both sides admitted that there was such a clause.] Then, in that case, Mr. Cockburn must have his name taken off generally.

Baily, *Ex parte*.

Ex parte BAILY, in re KOLLMAN'S RAILWAY LOCOMOTIVE AND
CARRIAGE IMPROVEMENT COMPANY.¹

December 9, 1850.

Joint-stock Companies Winding-up Acts — Contributory.

A party took shares in a joint-stock company, paid deposit and calls, but did not execute the deed. He having neglected to pay a call, the directors, in pursuance of a clause in the deed, resolved that his shares were forfeited, and communicated this resolution to him. The company being ordered to be wound up, the Master placed this person's name on the list of contributories; but, upon appeal, it was declared that he was not a contributory.

THIS was a motion, on behalf of Mr. Edward Hodges Baily, that the order of Master Kindersley, dated the 18th March, 1850, might be rescinded, and that the name of Mr. Baily might be expunged from the list of contributories of the above company. The company was formed in June, 1844, and Mr. Baily took five shares of 20*l.* each, and on these shares paid, by way of deposit and call, 25*l.* The company's deed of settlement was dated the 18th of March, 1845, but was not executed by Mr. Baily. By the 54th and 55th clauses of that deed, the mode of making calls, and of giving notice of such calls to the proprietors of shares, is regulated; and the 56th section related to forfeiture, and was as follows: 56. "That upon the neglect or refusal of any of the proprietors to pay any instalment which shall become payable on his or her share or shares as hereinbefore mentioned, for the space of one month next after the same shall become payable, it shall be lawful for a special board of directors, called for that purpose, to declare that the share or shares of the person or persons who shall so neglect or refuse, and all benefits or advantages whatsoever attending the same, shall thenceforth be forfeited to the company, in which case, but not otherwise, the same shall be forfeited." Mr. Baily having been applied to by letters, dated the 7th May and 10th June, 1845, for payment of a call which had been made, took no notice of the application; and accordingly, at a meeting of the board of directors, held on the 19th August, 1845, it was "Resolved, that the shares belonging to James Smith, Edward Hodges Baily, Edward Tufton Smith, and Lieut. W. Adam be forfeited for non-payment of call;" and the same was duly entered in the minute-book, and communicated to Mr. Baily by the secretary. The account under Mr. Baily's name in the company's ledger contained the following entry: "1845, Aug. 22. By shares forfeited for non-payment of call, 100*l.*"

An order to wind up the affairs of the company was made on the 19th January, 1849, and Mr. Baily's name was, in the first instance, expunged by the Master from the list of contributories, but on the application of the official manager the case was re-heard by the Master, in consequence of Lord Cottenham's decision in *Morgan's Case, re The vale of Neath and South Wales Brewery*, 1 Mac. & G. 225, and Master Kindersley, considering the cases similar in principle, restored the name to the list. The case of *Beresford*, in this same company,

¹ 15 Jur. 29.

Baily, *Ex parte*.

was brought before Knight Bruce, V. C., 3 De G. & S. 175. 14 Jur. 826, and, on appeal, before the Lords Commissioners, 14 Jur. 655, when Mr. Beresford, whose shares had been declared forfeited for not executing the deed of settlement, was held not to be a contributory. The 105th clause of the deed of settlement, under which Mr. Beresford's shares had been declared forfeited, is as follows: 105. "That if any of the several persons parties hereto, or whose names are mentioned in the schedule hereunder written, or either of them, shall neglect or refuse to execute these presents on or before the 18th day of April next ensuing, it shall be lawful for a board of directors at any time thereafter to declare, in writing, the share or shares of the person or persons who shall so neglect or refuse as aforesaid, or any of them, forfeited to the company; and in that case the share or shares so declared to be forfeited shall be actually forfeited, and shall thenceforth belong to the company, freed and discharged from all right or interest therein of the person or persons previously entitled thereto, anything hereinbefore contained to the contrary thereof in anywise notwithstanding." Although a schedule is above referred to, there was not one to the deed. *Beresford's Case* having been since decided by the Lords Commissioners, the present motion was made.

W. T. S. Daniel and *Vansittart Neale*, for the motion, contended that this case was governed by that of Mr. Beresford's, and cited *Ex parte Beresford*, 3 De G. & S. 175; 14 Jur. 657; and *Ex parte Maudslay*, 14 Jur. 1012, *ante*, p. 61. They also referred to *Upfill's Case* and *Cottle's Case*, before the House of Lords, 14 Jur. 843, *ante*, pp. 9, 13.

Bacon and *Glasse*, for the official manager. The directors had not power to declare the shares forfeited, the deed not having been executed by Mr. Baily. The proper course for them to pursue would have been to require Mr. Baily to execute the deed, and upon his refusal, to declare the shares forfeited under the 105th clause. This was done in *Beresford's Case*, and Mr. Beresford had been considered discharged from liability; but the present case was different in that very important respect.

Knight Bruce, V. C. I am not quite sure that I am differing from the Master; I hope I am not, for I hold his judgment in very high esteem. Acting entirely on the account which the official manager has given of what took place before the Master, I am not satisfied that the Master's judgment was taken upon the difference, or the absence of difference, between the present case and that of *Beresford*. How the present case would have stood if this gentleman had executed the deed, it is unnecessary to say. He never has executed the deed. I think that his conduct was equivalent to a refusal to execute the deed, and that the act of the directors in declaring his shares forfeited is an act which ought to be attended with the same effect as if he had been declared to have forfeited them for his refusal to execute the deed. Though, therefore, there is a specific difference between the present case and that of *Beresford*, I think that the difference between them

 Johnson v. Holdsworth.

is not substantial. It appears to me, therefore, that Mr. Baily's name ought not to remain on the list of contributories. His name must be expunged. The costs to come out of the estate. I have given no opinion how the case would have stood if the deed had been executed by him.

 JOHNSON v. HOLDSWORTH.¹

November 23, 24, and 25, 1850.

Registered Judgment — Foreclosure — Parties.

Subsequent judgment creditors, whose judgments are registered under 2 Vict. c. 11, but not in the county register, are not necessary parties to a suit for the foreclosure of lands in a register county.

THIS was a claim for foreclosure of lands in the East Riding of Yorkshire, by a judgment creditor, under a judgment registered on the 18th April, 1848, according to the 1 & 2 Vict. c. 110, and 2 Vict. c. 11, and also registered under the Yorkshire Registration Act; the land being already subject to a mortgage for a term of years, dated the 9th July, 1846. The mortgagor and the mortgagee were made defendants, the mortgagee being in possession. Affidavits were filed that there were two judgments registered under the 1 & 2 Vict. c. 110, and 2 Vict. c. 11, on the 21st January, 1848, and the 15th February, 1848, but it did not appear that these last-mentioned judgments were registered in Yorkshire.

Bethell, for the claim.

Amphlett, for the mortgagee in possession, objected that the two last-mentioned judgment creditors ought to be parties. It has been held that the purchaser is bound by notice, though the judgment be not registered in a register county, and that the creditor may at any time register his judgment and sue out an elegit. *Davies v. Lord Strathmore*, 16 Ves. 419, and cases cited in Sugd. V. & P., c. 15, s. 5. The mortgagor had notice that these judgments were registered in London. It is true that the stat. 6 Ann. c. 35, s. 19, says, "that no judgment which shall be obtained or entered into after the 29th September, 1708, shall affect or bind any honors, lands, tenements, or hereditaments situate, lying, and being in the said East Riding, but only from the time that a memorial of such judgment shall be entered at the register office in manner therein mentioned;" but this enactment has not been considered to deprive unregistered judgments of all validity; they have been held binding, and after registry to relate back to their date; besides, the enactments of 1 & 2 Vict. c. 110, are positive, and make registered judgments a charge on all lands whatever.

¹ 15 Jur. 31. 20 Law J. Rep. (n. s.) Chanc. 63.

Bethell, in reply. After the passing of the Registry Acts it was held that if a man took a conveyance for valuable consideration, but had notice of a judgment, even though unregistered, his conscience was bound by that notice; but it was never held that the unregistered judgment bound the land. In a suit to redeem, the only persons parties are those who have such a claim on the land as entitles them to redeem. [*Rolfe*, V. C.—I am struck with the distinction between judgment creditors; but there is this difficulty—the mortgagee is entitled to have such persons parties as will prevent the accounts from being taken over again. *The Bishop of Winchester v. Bevor*, 3 Ves. 317. My doubt is, whether the judgment, when registered, does not act retrospectively, so as to take effect from the time when the judgment was obtained. Suppose you obtain this decree, and you make default in paying the money, that operates as a foreclosure. Then suppose that, in the mean time, a judgment creditor registers, and appears to be a prior creditor, has he not a right to redeem?] If I file a bill, I am at liberty to disregard subsequent proceedings, and any person claiming under them has only the same rights as the party through whom he claims. Suppose it necessary to file a bill to get a transfer from an assignee *pendente lite*, then the assignee is never allowed to open or dispute the decree. [*Rolfe*, V. C.—In this case the doubt in my mind is this—one of the parties is the mortgagor seeking to redeem; and the mortgagor has, previous to the institution of the suit, confessed judgment, which you disregard, because the land is in a register county. But then suppose that hereafter the creditor should register that judgment *pendente lite*, then justice would seem to require him to be in the same situation as the person who has acquired an interest *pendente lite*. But it may be that it has operation, just as if it had been registered at the time when it was obtained.] Judgments under the act rank according to the dates of registration.

November 25, 1850. *ROLFE*, V. C., after stating the case, said—The plaintiff has only served the mortgagee and Holdsworth, and has made no other parties. The mortgagee objects, that the plaintiff ought to have made the subsequent incumbrancers co-defendants. To this the plaintiff replies, that their incumbrances never have been registered, as required by the statute of Anne. The question, then, is, whether they are necessary parties: first, as it would have stood before the passing of the act 1 & 2 Vict. c. 110, and then how it is altered by that act. The statute of Anne says that no judgment shall affect any lands but from the time that a memorial of such judgment shall be registered; therefore, before registration, the judgment creditor has no right, legally or equitably. But then it is said that, in equity, notice puts all parties in the same position as if their incumbrances had been registered; but I think that this is stating the proposition far too broadly. The rule of equity is, that where a purchaser has paid his money, with notice of an unregistered incumbrance, he shall not shelter himself behind an act which was made to protect parties without notice. Whether these decisions were

Jackson v. Grant.

originally within the spirit of the Registration Acts, I do not now stop to inquire. It is certain that a mortgagor, filing his bill to redeem, is bound, for the security of the mortgagee, to bring before the Court all parties who might call for redemption—that is to say, second mortgagees and subsequent incumbrancers; but in register counties an unregistered incumbrancer is not an incumbrancer either at law or in equity, though equity may give him the same rights as if he were an incumbrancer. This principle has obviously no application to the principle which compels a mortgagor, filing a bill to redeem, to bring the subsequent incumbrancers before the Court; therefore, on the law as it stood before the act 1 & 2 Vict. c. 110, I think unregistered incumbrancers were not necessary parties to a suit to redeem. The only question, then, is, as to the effect of that act. I expressed an opinion a few days since, *Hawkins v. Gathercole*, 14 Jur. 1103, *ante*, p. 135, as to the effect of sect. 13 of that act, that it makes the judgment a charge on all that the creditor might have taken under an *elegit*. He formerly might have taken half under an *elegit*; but it now goes further, and makes the judgment a charge on all. But that is the whole effect of that statute, and it is impossible to suppose that the Legislature ever meant to repeal the Registration Acts by a side-wind in this way. But, in fact, no such meaning as is contended for is to be found in the statute. The statute gives a right to take the whole of the land, instead of half, by *elegit*, but gives no right to obtain an *elegit* where it could not have been obtained before. I have not been able to discover any precedent for an *elegit* in a registered county; but it is plain, that, unless the judgment is registered, you cannot obtain an *elegit*. It appears to me, that sect. 13 must be read as only applying to a judgment legally registered. This construction, therefore, excludes an unregistered judgment, and the plaintiff has all proper parties before the Court, and is entitled to the usual decree.

JACKSON v. GRANT.¹

November 23, 1850.

Claim — Bill — Want of Parties — Costs.

THIS was a claim filed, by leave, by a married woman entitled to separate estate, against the trustees of her marriage settlement, alleging that they had misapplied and not invested the trust funds, and claiming to have the same, with interest, restored by the defendants.

Bethell and Kinglake, for the claim.

Tripp, for one of the trustees, objected that the husband was not a party.²

¹ 15 Jur. 72.

² This objection was held good in *Blatchford v. Tylee*, before Knight Bruce, V. C., December, 1850.

Money v. Jorden.

ROLFE, V. C., said that it was not an objection in limine, but that he must hear the case before he determined the point.

G. L. Russell and Spring Rice, for the other trustee.

When the claim was opened, it appeared that the affidavits were contradictory, and that there were many matters of fact in dispute. The counsel for the plaintiff stated that he considered the case was not a fit case for a claim, and asked for leave to file a bill, which his Honor gave, intimating an opinion, that where there was a conflict of affidavits, the proper course was to file a bill in the first instance.

Tripp asked for the costs of the claim, as having been improperly filed. The costs, however, were reserved.

MONEY v. JORDEN.¹

December 7, and 12, 1850.

Common Injunction, Dissolution of.

A bill was filed to restrain proceedings at law brought by three of the defendants, and the common injunction was obtained against the three. Two answered, and obtained an order to dissolve the injunction generally, which was made absolute, the third party not having answered. The defendants who had answered then issued execution against the plaintiff:—

Held, that they were not guilty of contempt of court in issuing execution, but that, under the circumstances, the orders *nisi* and *absolute* for dissolving the injunction ought to have been confined to the defendants who had answered.

Semble, on a proper case being made, the court will dissolve a common injunction obtained against three on the merits disclosed in the answer.

A JUDGMENT was entered up against the plaintiff by Charles Browne Marnell, in his lifetime, and the latter having by his will appointed the defendants, Louisa Jorden, the wife of the defendant, William P. Jorden, and George Money, his executrix and executor, a writ of *sci. fa.* was, after Charles Browne Marnell's decease, at the instance of William P. Jorden and his wife, issued against the plaintiff, in the names of William P. Jorden and Louisa Jorden and George Money, for the purpose of reviving the judgment. On the 7th March last, the plaintiff pleaded to the *sci. fa.* the plea of nul tiel record, and on the 22d of the same month he filed his bill against William P. Jorden and his wife, and George Money, for the purpose of obtaining an injunction to restrain the proceedings at law; and he accordingly, on the 5th April, obtained the common injunction against the defendants, Jorden and wife and George Money, restraining the proceedings at law till answer, but with liberty to proceed to trial, with stay of execution. Judgment was given on the *sci. fa.* in the names of William P. Jorden and Louisa his wife, as such executrix,

Money v. Jorden.

and also of the said George Money, as executor; but it appeared that the latter did not take any part in the proceedings, although he as well as the executrix had proved the will, and it was alleged that he was merely a formal party. The judgment was signed on the 22d April. The defendants, Jorden and wife, put in their answer on the 11th July, and on the 12th July, and obtained an order nisi for dissolving the injunction generally, although at this time George Money had not put in his answer, which was not filed till October following. On the 5th August a motion was made on the part of Jorden and wife to make the order nisi absolute. This was opposed by counsel on the part of the plaintiff, but the Court overruled the objections raised, and an order was made that the injunction should stand dissolved. The defendants, Jorden and wife, thereupon issued out execution on the judgment in the names of themselves as well as George Money, and the plaintiff was arrested under this execution on the 5th December; on the 7th December he moved that the defendants, Jorden and wife, might be committed for breach of the injunction, contending, that by the order of the 5th August, the injunction was dissolved only as against Jorden and wife, and not against George Money.

Turner and Bates appeared in support of this motion, and

Willcock against it.

LORD LANGDALE, M. R., expressed his opinion that the order ought to have confined the dissolution of the injunction to Jorden and wife; but, having regard to the terms of it, he could not hold the defendants guilty of a contempt, and he refused the motion.

December 12, 1850. *Turner and Bates* now moved, on behalf of the plaintiff, that both the orders nisi and absolute, dated the 17th July and the 5th August respectively, might be discharged for irregularity, or that the same might be varied, and that the injunction therein mentioned might be declared to be dissolved only as against the defendants, Jorden and wife, and that these defendants might be ordered to discharge the plaintiff out of the custody of the Sheriff of Middlesex, and that the defendants, Jorden and wife, might pay the costs of the application.

Turner and Bates, for the motion.

Willcock, contra.

The following authorities were cited. *Franklyn v. Thomas*, 3 Mer. 225. *Lewis v. Smith*, 7 Beav. 470. *Naylor v. Middleton*, 2 Madd. 131. *Nanny v. Vaughan*, 8 Sim. 439. *Kilby v. Stanton*, 2 Y. & J. 75. *Bowles v. Orr*, 1 Y. & C. 474. *Prince v. Haydin*, 3 Y. & J. 190, and *Tidd's* Prac. 1163, 8th ed.

LORD LANGDALE, M. R. This is a case in which the plaintiff filed

his bill to restrain an action at law, and he obtained the common injunction for want of answer. Two of the defendants answered, and they applied for, as of course, and obtained, an order nisi to dissolve the injunction. The petition on which the order was obtained truly stated that the action was brought by three, and that two had answered, and it asked, in general terms, for the dissolution of the injunction. The order nisi was drawn up in the usual form for the dissolution of the injunction generally. The question was raised, in the case of *Lewis v. Smith*, as to the regularity of such an order, and I was then of opinion, as I am now, that though the order was not drawn up in terms satisfactorily accurate, yet the terms were such as to enable the Court to give to the order that construction which justice required, and to order the injunction to be dissolved as to those applying for it, and no other. The time arrived for showing cause against dissolving the injunction, and it was discussed on the merits stated in the answer of the two defendants who had answered, and on their behalf alone. The question was not drawn to my attention, whether the injunction could be dissolved against three; the case was discussed on the answer of two only, whether it should be dissolved as against them. There is no difficulty as to the general rule, that if an injunction to restrain proceedings at law is obtained against three, those three must answer before the injunction can be dissolved against them. Obvious inconveniences would arise from the opposite doctrine, because all the equity of the case might be within the knowledge of the person who had not answered. There may be exceptions to the rule, without doubt. It would be a monstrous thing if there were not exceptions to the rule, and great injustice might be done to those who had answered. The matter must, somehow or another, be brought to the attention of the Court. There is that case in the Exchequer, *Kilby v. Stanton*, as to the mode of doing it. The point was not mentioned to me at all. The only question before me was, whether, on the answer of two, the injunction ought to be dissolved on the petition of two. A motion might have been made to dissolve the injunction against the three, if the circumstances were proper for such an application, and the opinion of the Court would then have been obtained whether the injunction should be altogether dissolved; but the question was not brought before the Court. The construction to be put on the order is this, that the injunction should be dissolved so far as it lawfully could be — that is, against the two. I am of opinion, without doubt, that this order was erroneous and irregular, and it was made because I did not know the facts. But the greatest error I know of is to persevere in an error, when pointed out. The first application was to commit the defendants for contempt of Court; but I was of opinion, that, looking at the order nisi, and thinking that the orders of a Court of justice ought to be expressed so that a party may be able to see the meaning of them, I ought not to punish them for contempt. But the question now is, whether I ought not to put the parties in the condition in which they would have been if the order had not been made. If all the facts had been stated in the petition, the officer of the Court would have confined the order to the defend-

In re Dickson.

ants who had answered. The matter must be set right, and an order made in the terms adopted by Lord Eldon in that case of *Franklyn v. Thomas*, 3 Mer. 236.

*In re DICKSON.*¹

November 4, 20, 1850.

Will — Legacy — Restriction against a Female becoming a Nun — Forfeiture of Legacy.

A testator, by a codicil to his will, declared that in case his daughter should carry out her intention of taking the veil, becoming a nun, continuing to reside in a convent, or in any other way associating herself permanently with any Roman Catholic establishment of that nature, she should forfeit all claim to, or benefit from, the bequest of 10,000*l.* given her by his will for life, and afterwards to her children; and he thereby, in that case, revoked the said bequest; and in order to prevent any portion of his property from being appropriated to other purposes than the benefit of his family, he excluded his said daughter from all reversionary advantages whatever from his said will. The testator's daughter having associated herself with a convent of nuns at Hammersmith, the trustees of the will paid the 10,000*l.* into Court under the Trustee Act. Upon petition by the daughter, that the said sum might be paid out for her benefit, it was

Held, that the condition imposed was a lawful condition, although the will contained no bequest over, and the legatee had forfeited all claim to the legacy. Petition dismissed.

THIS was the petition of Mary Eleanor Dickson, and it stated that Major-General William Dickson, the petitioner's late father, by his will, dated the 4th of March, 1848, bequeathed the sum of 10,000*l.* to his trustees upon trust to invest the same in government or real securities, and to pay the annual produce thereof to his daughter, the petitioner, for her life, for her sole and separate use, independent of the debts, control, or engagements of any husband she might marry, without power of anticipation, and after her decease the said sum of 10,000*l.*, and the stocks and securities thereof, and the annual produce thereof, should be in trust for all and every the child and children of his said daughter, upon attaining the age of twenty-one or marriage, in manner therein mentioned, and if there should be no child of his said daughter who should live to attain the age of twenty-one or marriage, then the said sum of 10,000*l.* should, subject to the trusts aforesaid, be in trust for his two sons in equal proportions absolutely; and the testator bequeathed the residue of his property to his trustees, upon trust to pay the interest thereof to his wife for life, and after her decease, upon trust for his said two sons in manner therein mentioned. And by a codicil to his said will, dated the same day as the will, the testator, after declaring that he had discovered he had power to appropriate the amount of his wife's fortune, after his death, amongst his younger children, bequeathed the sum of 500*l.* to the petitioner, Mary Eleanor Dickson, and the remainder of the said fortune was to be divided equally between his remaining younger children. The tes-

¹ 20 Law J. Rep. (n. s.) Chanc. 33.

In re Dickson.

tator then continued, "In this the distribution of my personal property in my said will, I left the sum of 10,000*l.* to my executors therein named, in trust to pay the interest of that sum to my daughter, Mary Eleanor Dickson, during her life, &c.; but now, finding that she contemplates remaining in a Roman Catholic convent, and becoming a nun, I consequently hereby declare that in the event of her carrying out her intention of taking the veil, becoming a nun, continuing to reside in a convent, or in any other way associating herself permanently with any Roman Catholic establishment of that nature, she shall forfeit all claim to, or benefit from, the said sum of 10,000*l.*, and I hereby, in that case, revoke the said bequest; and in order to prevent any portion of my property from being appropriated to other purposes than the benefit of my family, I hereby exclude my said daughter, Mary Eleanor Dickson, from all reversionary advantages whatever from my said will." The affidavit of the clerk to the solicitor for the trustees stated that he served a notice on the petitioner at the Roman Catholic convent at Hammersmith, to the effect that the trustees had paid the sum of 10,000*l.* into Court, under the Trustee Act, and that the said M. E. Dickson was an inmate of the said convent; and that at the time he served the notice, the said M. E. Dickson was dressed in the habit of a nun, and appeared to have permanently associated herself with the said Roman Catholic establishment.

The petition prayed that the sum of 10,000*l.*, which had been paid into court under the Trustee Act, might be paid out for the benefit of the petitioner.

Mr. Bethell and *Mr. Freeling* appeared in support of the petition, and contended that the clause in the codicil must be construed as having been inserted *in terrorem* only, as there was no gift over of the 10,000*l.* in the event contemplated as the ground of forfeiture; and that, at all events, the condition was one which the law would not allow. The following cases were cited: *Maples v. Bainbridge*, 1 Mad. 590, in which a restriction upon marriage with no gift over was held to be *in terrorem*; *Morley v. Rennoldson*, 2 Hare, 571; s. c. 12 Law J. Rep. (N. S.) Chanc. 372, where a restraint on marriage was held to be void; and *Lloyd v. Branton*, 3 Mer. 108.

Mr. J. Parker, for the residuary legatees, contended that, upon the true construction of the will and codicil, the whole bequest of the 10,000*l.* failed by reason of Miss Dickson having become associated with the Roman Catholic convent; and that, as a necessary consequence, the fund fell into the residue of the testator's estate. The following cases were cited: *Page v. Leapingwell*, 18 Ves. 462. *Hunt v. Berkley*, Mosely, 48. *Falkner v. Buller*, Amb. 514. *Carter v. Taggart*, 16 Sim. 423.

Mr. Bethell having been heard in reply, his Honor reserved his judgment.

November 20, 1850. ROLFE, V. C. The relief asked would be matter

of course, if the title of the petitioner had rested on the will alone, under which she certainly took an interest for her life in the funds. But the question is, how far that interest is affected by the codicil, it being admitted at the bar by the counsel for the petitioner, that she has associated herself permanently with a Roman Catholic establishment in the nature of a convent, and so has brought herself within the purview of the clause of forfeiture contained in the codicil. The first point for inquiry is, what, in the circumstances which have happened, are the intentions of the testator, as expressed on the face of the will and codicil. On this point there cannot, I conceive, be any doubt whatever. The testator in terms says, "If my daughter associates herself permanently with a Roman Catholic establishment, then I revoke the bequest in her favor of 10,000*l*. On such an event occurring, my will is to be read as if it contained no such bequest." It is impossible for an intention to be more clearly expressed.

The intention, then, being clear, the next question is, whether it is a lawful intention. What doubt can exist on this point? It is surely competent for a testator, by a clause properly framed, to limit the interest which he gives to his daughter to such a time as she shall remain unconnected with a convent, and if this may be lawfully done by an original limitation of the interest given, there can be nothing unlawful in a clause framed for bringing about the same result by means of a condition subsequent. Independently, therefore, of authority, I should have thought the case was free from doubt. The intention, it is admitted, is a lawful intention, and expressed so as to leave no doubt as to what it is: why is the Court not to carry it into effect? The ground relied on by the petitioner is a supposed rule of law, that wherever there is a legacy given absolutely in the first instance, but followed by a declaration that it shall be forfeited, or that it is revoked, if the legatee does not comply with some condition subsequent mentioned in the will, there, unless on the non-compliance with such condition the legacy is given over, the clause of forfeiture or revocation is inoperative, being treated as a mere idle threat to induce the legatee to comply with the condition, and not really to affect the bequest. I do not, however, think that any such rule of law exists. The argument in favor of the existence of such a rule was derived from a supposed analogy between the case put and a case of a bequest which the testator has declared to be forfeited on the marriage of the legatee. In such cases there are, no doubt, very numerous authorities for the proposition that the legatee takes an absolute legacy, and the condition subsequent attempting to defeat it upon the legatee contracting marriage is void. The condition is said to have been introduced into his will by the testator merely *in terrorem*, and not to have been intended by him really to affect the interest of the legatee. It is impossible to refer to the numerous cases on this subject without feeling that the Judges, in deciding them, have never felt very sure of the ground on which they were treading. It is, however, certain that the decisions have proceeded on maxims of the civil, and not the common law. Now, by the civil law, any condition in restraint of marriage was consid-

ered as a *conditio rei non licite*, and therefore, in whatever form imposed, it was held to be null and void. The subject is discussed in the 35th book of the "Pandects," c. 33, to which it is sufficient to refer. Inasmuch, therefore, as legacies may be sued for and recovered in the ecclesiastical Courts, where the rules of the civil law would prevail, this Court has felt itself bound to conform to that law, in order that there might not be a conflict of decision in the two Courts. In cases, therefore, where a legacy has been given, coupled with a condition that the legatee shall not marry, there this Court has felt bound to hold that the testator could not really have meant what he has said; or, if he did mean it, then that he meant to prohibit what he had no right to prohibit, and so that his expressions must be considered as merely indicating his wishes, and so far as they import a forfeiture of the bequest, used merely *in terrorem*. The rule itself and the reasoning upon it, and the grounds which have been relied on as taking cases out of its operation, have been often stated to be very unsatisfactory.¹ But the rule is established, and it would be very unsafe to call it in question in cases to which it applies. But I do not think that this is such a case. The rule depends for its principles not merely on the form in which the intention is expressed — not merely on its being a condition subsequent, but also on the nature of the condition which is to determine the legacy. If the condition, being a condition subsequent, be in the class of those which impose a restraint considered by the civil law as unlawful, there if the condition be a simple prohibition, or a prohibition with a declaration of the forfeiture of the legacy without more, the rule of the civil law prevails, *remittitur conditio*, and the legacy stands as if no such condition had been found in the testament. If, on the other hand, there be something beyond a condition and clause of forfeiture, — if the forfeited legacy is, on breach of the condition, given over; or, which is the same thing, is directed to become part of the residue, and that residue is given over, — then this Court disregards the doctrine of the civil law, and acts on its own ordinary rules. The legatee over becomes entitled, and the original legatee forfeits his legacy. It is not necessary to inquire whether this doc-

¹ In the late case of *Commonwealth v. Stauffer*, 10 Barr, (Pennsylvania,) 350, it was held that a subsequent condition in general restraint of marriage, when annexed to a devise of land, was not void, on account of public policy; and where the testator devised real and personal estate to his wife, provided she remained a widow for life, but, in case she married, she was to leave the premises; and if she remained a widow for life, the testator devised all his property, after her death, to his father and mother, if living, if not, to others; it was held, the land having been sold for the payment of debts, and the widow having married, that the testator's mother was entitled to recover the sur-

plus proceeds of the real estate, his father having died before the widow's marriage.

The rule alluded to in the text is, however, still the rule in Pennsylvania, as to bequests of personal property; and in *Hoopes v. Dundas*, 10 Barr, 75, where the clause in a will was, "I do give to my executors an annuity or yearly sum of \$600, to be paid to Sophia Pratt, the widow of my deceased son, during all the term of her natural life, if she so long remain his widow unmarried," with a devise over of the residue of his estate, and the annuitant afterwards married, the condition was held void, and she was allowed to receive the annuity after her marriage.

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trine can under any circumstances be applicable to the case of a condition precedent. The same rule that prevails in the case of legacies which are revoked on the marriage of the legatee, prevails also in the case of a legacy made void in case the legatee should dispute the will of the testator, — and on the same ground, viz., that the condition has been considered (whether justly or not it is unnecessary to inquire) as contrary to the policy, or according to the language of the *Touchstone*, p. 132, “against the liberty of law.” Such a condition, therefore, like a condition in restraint of marriage, has been considered as a *conditio rei non licitæ*, and so it has been treated as a mere clause *in terrorem*, unless where there has been a gift over on the condition being broken.

Now, in the present case, there is certainly no gift over. There is merely a revocation of the legacy on the happening of the event which has occurred — namely, the legatee associating herself with a Roman Catholic establishment. If, therefore, this was like a condition in restraint of marriage, or a condition not to dispute the will, to be treated as a *conditio rei non licitæ*, the doctrine to which I have referred would apply. The testator would have been treated as merely expressing strongly his wish on a subject on which he had no right to impose restraint, and that expression of wish would have been inoperative. But the condition here imposed is a perfectly lawful condition. There is neither principle nor authority for saying that a parent may not make a provision for his daughter cease on her taking the veil, or becoming permanently connected with a convent. The condition is a *conditio rei licitæ*, and so the rules derived from conditions in restraint of marriage or otherwise against the liberty of the law are inapplicable. That being so, all we have to do is to ascertain what, in the events which have happened, is the testator's intention as expressed on the face of his will. As to this, there can be no doubt. That state of circumstances has occurred in which the testator expressly says he does not mean his daughter to have any interest in the 10,000*l*. And I am, therefore, of opinion that she is not entitled to it; and the petition must be dismissed.

L'ESTRANGE v. L'ESTRANGE.¹

November 21, 1850.

Equitable Assignment — Appropriation — Foreign Attachment.

L'E., an officer, retired from the army, in consequence of which his commission became salable. Being indebted to the plaintiff in the sum of 500*l*., he gave him a letter to Messrs Cox, army agents, requesting them to pay the balance of the price of his commission to the plaintiff, who sent the letter, with another of his own, to Messrs. Cox, requesting payment, but they had not then received any money. The plaintiff, having heard that an *en-sign* had been gazetted, again applied for payment, and he received a letter informing him

¹ 20 Law J. Rep. (N. S.) Chanc. 39.

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that the ensign gazetted was not in the succession of L'E., but that, after the 14th of June, he might draw on Messrs. Cox for 408*l.* 10*s.* 11*d.*, the balance arising from the sale of the commission. In the mean time M. S. obtained a foreign attachment from the Lord Mayor's Court against L'E. for 500*l.*, due on a bill of exchange, and attached the moneys, &c., of L'E. in the hands of Messrs. Cox. The plaintiff then filed this bill, and upon an application for an injunction to restrain Messrs. Cox from parting with the money:—

Held, that Messrs. Cox had recognized the plaintiff's demand, and that it amounted to an appropriation of the money to arise from the sale of the commission; and an injunction was granted.

THIS was a motion, on behalf of the plaintiff, George L'Estrange, for an injunction to restrain Maurice Salaman from proceeding against Harry L'Estrange, and against Richard Henry Cox, Charles Hammersley, Henry Richard Cox, and Frederick William Cox, army agents, in the Lord Mayor's Court, and to restrain Messrs. Cox from paying to any person other than the plaintiff, or otherwise parting with the sum of 408*l.* 10*s.* 11*d.*, arising from the sale of the commission of the defendant, H. L'Estrange, in the 31st Regiment of Foot, until the defendants should have put in their answers.

H. L'Estrange was a captain in the 31st Regiment of Foot, and on the 19th of April, 1850, he resigned his commission, which became salable, according to the usual regulations in the army. He was then indebted to his brother, G. L'Estrange, in the sum of 500*l.*, for moneys advanced to or paid for him. Frequent applications had been made for payment, and on the 26th of April, 1850, H. L'Estrange delivered to the plaintiff the following letter, addressed to Messrs. Cox & Co., army agents, London:—

"Gentlemen: Please pay to G. L'Estrange, Esq., my brother, or bearer, the balance of the price of my company in the 31st regiment, which remains in your hands. I have the honor to be, gentlemen, your most obedient servant,
HARRY L'ESTRANGE."

On the 1st of May, 1850, the plaintiff delivered the letter to Messrs. Cox & Co., accompanied by the following note:—

"When you receive any further sum on Captain L'Estrange's account, as the balance arising from the proceeds of his commission, I request you will forward the amount to me in bank post bill.

"G. L'ESTRANGE."

The plaintiff having heard that an ensign had been gazetted, wrote to Messrs. Cox & Co., requesting to be informed when he might draw on them in pursuance of the letter of the 26th of April, 1850, when he received from Mr. Howard, a clerk of Messrs. Cox & Co., the following letter:—

"Craig's Court, 30th May, 1850.

"Dear Sir: The ensign appointed to the 31st regiment on the 17th instant, was not in your brother's succession; but the candidate for the ensigncy will, I have no doubt, go up for examination on the 4th of June, and if he passes, I expect he will be gazetted on the 14th of that month; after which time you will be at liberty to draw on Messrs. Cox & Co. for 408*l.* 10*s.* 11*d.*, which will be the balance on Captain L'Estrange's account after the 450*l.* is received for the ensigncy. Believe me yours, faithfully,
D. HOWARD."

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On the 14th of June, the following letter was sent to Captain L'Estrange by Messrs. Cox & Co.:—

“Craig's Court, 12th June, 1850.

“Sir: An attachment, of which the annexed is a copy, having been served upon us, from the Lord Mayor's Court, at the suit of Maurice Salaman, we beg to inform you that the effect of this proceeding is to take away from you all control over the moneys we may hold on your account, and which, in due course, will be ordered to be paid into the Lord Mayor's Court, unless you take immediate steps to defend the proceedings. We are, &c.,
Cox & Co.”

On the back of this letter was written as follows:—

“1850, June 3. Richard Henry Cox, Charles Hammersley, Henry Richard Cox, and Frederick William Cox,—Take notice, that by virtue of an action entered in the Lord Mayor's Court, London, against Harry L'Estrange, defendant, at the suit of Maurice Salaman, plaintiff, in a plea of debt upon demand of 1000*l.* (sworn 500*l.*) I do attach all such moneys, goods, and effects as you now have, or which hereafter shall come into your hands or custody, of the said defendant, to answer the said plaintiff in the plea aforesaid, and that you are not to part with such moneys, goods, or effects, without license of the said Court. Signed C. Sewell, serjeant-at-mace, G. S. R. Reynal, plaintiff's attorney, Lord Mayor's Court Office, Old Jewry.”

This letter was opened by the plaintiff, who wrote to Mr. Howard as follows:—

“June 14, 1850. Dear Sir: I opened a letter from Messrs. Cox & Co. to my brother, Captain L'Estrange, this morning, saying the money has been attached as Captain L'Estrange's. You hold Captain L'Estrange's check to me for all moneys due to him by you; you will please explain this, and forward me the amount, 408*l.* 10*s.* 11*d.*, or whatever the sum is which is in Messrs. Cox's hands, by bank post bills, to my address. Believe me yours, truly,

“G. L'ESTRANGE.

“P. S. This money, as you know, is mine, and not Captain L'Estrange's, he having given me the check, as it was owing to me. Yours, &c., G. L'E.”

From the affidavit sworn in the Lord Mayor's Court, on the 3d of June, 1850, upon which the attachment issued, it appeared that Harry L'Estrange was indebted to Maurice Salaman in the sum of 500*l.*, on a bill of exchange dated the 21st of March, 1850, drawn by Maurice Salaman on and accepted by Harry L'Estrange, and made payable one month after the date thereof, to the order of Maurice Salaman.

The bill then charged that the proceedings in the Lord Mayor's Court were taken by M. Salaman to compel Messrs. Cox & Co. to pay him the moneys in their hands as agents, in respect of the sale of the commission. That on the 18th of August, 1850, when the ensigny, consequent on the resignation of Captain L'Estrange, was gazetted, the price, which had been paid to Messrs. Cox, became paya-

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ble to the plaintiff under the order of the 26th of April, 1850, it being an equitable assignment or lien on the sum of 408*l.* 10*s.* 11*d.*, in their hands, arising from the sale of the commission. That Messrs. Cox had refused to pay the same to the plaintiff, who, as his interest was merely equitable, could take no proceeding in the Lord Mayor's Court, and had no remedy either to prevent judgment being obtained against Messrs. Cox, or to restrain them from paying the money to M. Salaman; and that they, though they entered the order of the 26th of April, 1850, in their books, and wrote or authorized the writing of the letter of the 30th of May, 1850, intended to pay to M. Salaman the sum of 408*l.* 10*s.* 11*d.* as soon as final judgment should be signed against H. L'Estrange in the action in the Lord Mayor's Court: that the sum of 500*l.* was still due to the plaintiff, and that he could have no relief except in this court; and it prayed for a declaration that the letter of the 26th of April, 1850, was, or operated as, an equitable assignment to the plaintiff of, or that such letter, in conjunction with the letter of the 30th of May, 1850, created an equitable charge or lien, in favor of the plaintiff, on the balance of the moneys arising from the sale of the said commission, and in particular on the balance of the 450*l.* paid to Messrs. Cox & Co., in respect of such ensigny, and that if necessary an account might be taken of the balance of the moneys in the hands of Messrs. Cox & Co., arising from the sale of the said commission, and also that the injunction now asked for might be granted.

Mr. Turner and *Mr. Schomberg*, in support of the motion for an injunction. The letter of the 26th of April, 1850, operated as an assignment of the money arising from the sale of the commission, and gave the plaintiff a title to payment. There was no money in Messrs. Cox's hands at the time, but an expectancy may be assigned for valuable consideration. *Row v. Dawson*. 1 Ves. sen. 331. *Ex parte South*, 3 Swanst. 392. *Collyer v. Fallon*, Turn & R. 459; s. c. 3 Law J. Rep. Chanc. 23. *Burn v. Carvalho*, 4 Myl. & Cr. 690; s. c. 7 Sim. 109. 9 Law J. Rep. (n. s.) Chanc. 65.

Mr. Palmer, for *Mr. Salaman*. This case is not within the authorities on principle, and is not an equitable assignment of a chose in action. The allegation of debt in the bill is much too general. The form of the document given is nothing more than a check. In the whole of the cases there was a transfer of something existing, but it was not so in this case. Suppose a check was given directing the payment of a balance in hand, was it to operate as an equitable assignment? The instrument must be sufficient for the purpose intended. But if the instrument was not a check it was nothing more than a bill of exchange, and was inoperative for want of a stamp. *Lord Braybrooke v. Meredith*, 13 Sim. 271; s. c. 12 Law J. Rep. (n. s.) Chanc. 289. *Parsons v. Middleton*, 6 Hare, 261.

Mr. Turner, in reply.

The MASTER OF THE ROLLS. The letter of the 26th of April,

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1850, was received by Messrs. Cox, and their letter of the 30th of May, 1850, stating the time when the plaintiff might draw upon them, was a recognition of the plaintiff's demand, and amounted to an appropriation of the money to arise from the commission. I must, therefore, grant the injunction.

In order to constitute an equitable assignment of a particular fund, there must be an absolute transfer of the control of the fund to the assignee. *Dickenson v. Phillips*, 1 Barbour, Sup. Ct. R. 454; which will authorize the holder of the fund to pay it to the assignee, without the further interference of the debtor. *Hoyt v. Story*, 3 Barbour, Sup. Ct. R. 262. And it seems that any assignment of a chose in action, which is valid between the parties, cannot, in the absence of fraud, be defeated by a process of foreign attachment, served on the holder of the funds before payment of the same, at the suit of a creditor of the assignor. *Littlefield v. Smith*, 17 Maine, 327. And a *parol* assignment of a chose in action, for a valuable consideration, with a delivery of the evidence of the debt, may be sufficient. *Idem. Porter v. Bullard*, 26 Maine, 448. *Jones v. Witter*, 13 Mass. 304. *Grover v. Grover*, 24 Pick. 261. *Vose v. Handy*, 2 Greenleaf R. (2d ed.) 308, and note. And if the assignment or order is in writing, it need not be negotiable, nor *expressed to be* for value received. *Johnson v. Thayer*, 17 Maine, 401. *Legro v. Staples*, 16 Maine, 252. *Adams v. Robinson*, 1 Pick. 461. *Harrington v. Rich*, 6 Vermont, 666. Such assignment must, however, in fact, be *bona fide*, and upon adequate consideration. *Langley v. Berry*, 14 New Hampshire, 82.

Where an order is drawn, for payment of the *whole* of a particular fund in the drawee's hands, it has been held an equitable assignment of that fund to the payee, and to bind the funds in the drawee's hands from the effect of a subsequent foreign attachment, although on the receipt of such order by the drawee, he does not agree to pay it. *Robbins v. Bacon*, 3 Greenleaf R. (2d ed.) 346, and note. And see *Blin v. Pierce*, 20 Vermont, 25. But an order or draft for *part* only of a debt, which is one and entire, does not, without the assent of the drawee, amount to an assignment; for a debtor is not to be subject to distinct demands on the part of several persons, when his contract is one and entire. *Gibson v. Cooke*, 20 Pick.

15. *Mandeville v. Welch*, 5 Wheaton, 277.

And an accepted order, payable to the drawee's own order, will not constitute a sufficient assignment of the debt, as against a subsequent foreign attachment. *Cushman v. Hayes*, 20 Pick. 132. Nor would an assignment to such person as the drawer should afterwards name; for that in effect is an assignment to himself. *Shaw, C. J.* 20 Pick. 134.

A debtor may lawfully assign to a *bona fide* creditor his future earnings; and if his employer agree to pay the same to the assignee, he will not, after such wages have been earned, be liable in a suit of foreign attachment by a creditor of the assignor. *Weed v. Jewett*, 2 Metcalf, 608.

But where a debtor agreed verbally with his creditors and a third person, that such third person should receive the debtor's future earnings from his employers and distribute them to his creditors, and the employers did not assent, but only verbally agreed to notify such third person, when the wages were due, and pay him the amount, if the debtor had no objection, and would sign the pay-roll, it was held, that this was not equivalent to an assignment to such third person, of the wages which had subsequently become due, and that the employers were liable as trustees of the debtor. *Walker v. Russell*, 17 Pick. 280.

So where a debtor drew this order on his employers, "Please pay A. my wages from month to month, as they may become due, and what may now be due me," and the employers accepted the order and paid the wages to A. for several months, but were subsequently sued in a process of foreign attachment by a creditor of the drawer, but A. gave them no notice that he had made any advances on the faith of the order, or that he claimed the money by virtue of it, although he had knowledge of the trustee process, it was held, that such order did not, *prima facie*, constitute an assignment to A., but only an authority to pay to him, and the drawer's employers were held liable as his trustees. *Carrique v. Sidebottom*, 3 Metcalf, 297. See *Bourne v. Cabot*, 3 Metcalf, 305.

Mackinnon v. Stewart.

MACKINNON v. STEWART.¹

November 20; December 2, 1850.

Debtor and Creditor — Creditor's Deed — Voluntary Deed of Agency — Equitable Incumbrance — 1 & 2 Vict. c. 110.

The plaintiff being entitled to a legacy under a will, filed a bill against the executor for payment, and obtained a decree for the amount due. The executor had previously conveyed his property to trustees for the benefit of his creditors. The plaintiff, who was no party to that arrangement, not being able to obtain payment under the decree, issued writs of *elegit* and sequestration against the property of the executor, and then filed this bill against the executor and the trustees of the creditors' deed, praying that the deed might be declared a voluntary deed of agency, and that the trustees might be restrained from setting it up against the writs of *elegit* and sequestration, and that the plaintiff might be declared entitled, upon the expiration of a year from the first decree being registered, to an equitable charge for the amount decreed to be paid:—

Held, that the creditors' deed effectually created a trust for the benefit of the creditors, which they had a right to insist upon being performed: and that it was not a mere deed of agency, and was irrevocable as against the creditors.

THIS bill was filed on the 1st of March, 1849, and amended on the 19th of July, 1849, and it stated that the plaintiff, Frances Mackinnon, was absolutely entitled under the will of Philip Bond, dated the 28th of March, 1833, to a sum of 1333*l.* 6*s.* 8*d.* 3 per cent. consols: that the defendant, James Stewart, was the surviving executor of the will, and neglected to transfer the said sum of stock to her, but has paid her from time to time certain sums of money on account of the dividends and interest thereof: that in June, 1847, the plaintiff filed her bill against the said James Stewart for the recovery of the said legacy, and when the cause came on for hearing on the 11th of May, 1848, it was ordered that the said James Stewart should pay into Court the sum of 1193*l.* 6*s.* 7*d.*, being the amount produced by the sale of the stock bequeathed to her by the said testatrix, and that the sum of 188*l.* 18*s.*, 4*d.*, being the amount of interest due thereon, and the costs of the suit should also be paid to the plaintiff: that the said interest and costs together amounted to 281*l.* 13*s.*, and that the plaintiff, not having been able to obtain payment of the said sum, issued a writ of *elegit*, but that such writ, for reasons therein mentioned, could not be executed: that the said sum of 1193*l.* 6*s.* 7*d.* not having been paid according to the before-mentioned decree, a writ of sequestration for that amount was issued upon all the messuages, lands, tenements and real estate of the said J. Stewart: that such writ of sequestration had never been executed: that by an indenture, dated the 20th of November, 1846, made between the said J. Stewart, who then carried on the business of hotel-keeper, of the first part; the defendants, W. Cripps, E. W. Burgess, and J. Hannah, three of the creditors of J. Stewart, of the second part, and several other persons also creditors of J. Stewart, of the third part, the said J. Stewart conveyed all his freehold and leasehold property to the three defendants, parties to the indenture of the

¹ 20 Law J. Rep. (N. S.) Chanc. 49.

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second part, and their heirs, upon trust to sell the said property and stand possessed of the proceeds, in the first place to pay the costs attending the preparation of the said indenture, and the trusts thereby imposed upon them, in the next place to pay and discharge the several mortgages, liens, and other incumbrances subsisting upon the said property, and in the next place to pay ratably and proportionally and without any preference to the several persons, parties of the second and third parts, the several sums set opposite to their names in the schedule thereunder written, and after all the said debts should be satisfied, then to pay the residue to the said J. Stewart: that the said three trustees thereupon entered into possession of the said property, and insisted that the writs of *elegit* and sequestration so issued as aforesaid at the suit of the plaintiff could not be executed on any of the estates and premises conveyed to them by the said indenture, and that the plaintiff was thereby deprived of all benefit from the decree of this Court of the 11th of May, 1848. The bill then alleged that the said indenture of November, 1846, was a mere voluntary deed of agency, and that no estate, right, or interest was thereby vested in the said three trustees which ought to prevent the execution of the said writs of *elegit* and sequestration, and that they ought to be restrained from availing themselves of the estates thereby conveyed to them, so as to defeat the execution of such writs. The bill also alleged that the said indenture of November, 1846, was only executed by a very few of the creditors of J. Stewart, and such of them as had executed it had only done so after the execution thereof by J. Stewart, and a short time previously to the institution of this suit. That the same was not executed by virtue of any bargain made with J. Stewart and any of his creditors, and that there was not any consideration from the creditors to him for the execution thereof, and that the same was revocable at any time by the said J. Stewart, and upon such revocation the said three trustees would be bound to reconvey or redeliver to him all the estate and interest vested in them by such indenture.

The bill charged, amongst other things, that on the expiration of one year from the 24th of November, 1848, the day on which the order of the 11th of May, 1848, was registered, the plaintiff would be entitled to a charge upon all the freehold estates of the said J. Stewart for the sums decreed by such order to be paid and interest thereon. And it prayed that it might be declared that the deed of 1846 was a mere voluntary deed of agency, and that the said three trustees might be restrained from availing themselves of any estate or interest in the freehold hereditaments of the said J. Stewart, or in any part of his personal estate vested in them by virtue of the said indenture, so as to defeat the said writs of *elegit* and sequestration issued by the plaintiff as aforesaid; that a receiver might be appointed of the said estates; that the said three trustees might be restrained from selling or interfering with such estates, and that it might be declared that on the expiration of one year from the 24th of November, 1848, the plaintiff was entitled to an equitable charge on such freehold estates for the amount decreed to be paid by the said J. Stewart,

and that the said three trustees might be decreed to deliver up to the plaintiff or to the sheriff to whom the said writ of *elegit* was directed, all the personal estate of the said J. Stewart now in their possession by virtue of the indenture of November, 1846.

The defendant, J. Stewart, by his answer, admitted the debt due to the plaintiff, and that the said indenture of November, 1846, was executed by him as in the bill mentioned, but alleged that it was so executed upon the express understanding and agreement with the said three trustees that the plaintiff should be paid in full before any dividend was paid to his other creditors, and that he would not otherwise have executed such deed.

The defendants, the three trustees of the deed of November, 1846, by their answer, stated that they believed the said deed was not executed by virtue of any bargain made with the said J. Stewart and any of his creditors, except only that it was understood between the said J. Stewart and his creditors so executing the deed that the said J. Stewart was not to be made a bankrupt. They, however, insisted upon the said deed being valid, and alleged that it was executed by nearly all the creditors of J. Stewart, (above thirty in number,) and before the institution of the plaintiff's first suit against the said J. Stewart.

Mr. Stuart and *Mr. Terrell*, for the plaintiff, contended that the deed of November, 1846, was a mere deed of agency, and created no trust in favor of the creditors; that the possession of the property was the same as if it still remained in Stewart's own possession, and that there was no evidence of any contract with the creditors. There was no covenant on the part of the creditors not to sue, which proved it was a mere deed of agency. There was in fact no contract and no relation between Stewart and the creditors, and nothing to make the claim of the creditors other than it was before the deed. It was only a conveyance by a debtor for distribution of his estate among his creditors, and such a deed could give them no right whatever, and it might be revoked at any time by Stewart himself. There was nothing in this deed to take it out of the authority of *Garrard v. Lord Lauderdale*, 3 Sim. 1. *Acton v. Woodgate*, 2 Myl. & K. 492; s. c. 3 Law J. Rep. (N. S.) Chanc. 83. *Wilding v. Richards*, 1 Coll. 655; s. c. 14 Law J. Rep. (N. S.) Chanc. 211. *Gibbs v. Lady Glamis*, 11 Sim. 584.

Mr. Bethell and *Mr. Nerinson*, for the defendant, Stewart, read from his answer the allegation that it was agreed at the time of executing the creditors' deed that the plaintiff's claim should be satisfied before that of the other creditors. The trustees had consequently broken their agreement, and Mr. Stewart was subjected to the opprobrium of their misconduct. It was contended that the deed, although good against the creditors, was invalid as against the plaintiff, on the ground that it had been executed at the time when a suit had been instituted for payment of the plaintiff's legacy, or that at any rate the trustees had notice of the plaintiff's claim. The deed was in

effect a fraudulent conveyance as against the plaintiff, who was not a consenting party to the transaction.

Mr. Rolt and *Mr. Amphlett*, for the trustees of the creditors' deed, contended that the bill did not allege any thing for the purpose of setting aside the deed, except that it was a mere deed of agency. The plaintiff's debt was not provided for by the deed, but how was it possible to set the deed aside when there was not a word in the bill to impeach it? The bill did not ask that the deed might be set aside, but only that the execution of it might be restrained so far as it interfered with the writs of *elegit* and sequestration. It had been urged that the deed was not executed before the institution of the first suit, but that was denied by the evidence on the part of the trustees. The only ground then on which the relief could be granted, was that the deed was a mere deed of agency, but there was sufficient authority that this argument was of no avail. There was here an express trust created for the creditors, and the deed was irrevocable by Stewart as against them. It was true there was no consideration expressed to be given to the debtor, but this made no difference. The creditors had executed the deed, and the trust was equally valid and capable of being enforced against Stewart. The following cases were cited: *Browne v. Cavendish*, 1 J. & L. 606. *Simmonds v. Palles*, 2 *Ibid.* 489. *Fitzgerald v. Stewart*, 2 R. & M. 457.

Mr. Stuart, in reply.

ROLFE, V. C., reserved his judgment.

December 2, 1850. ROLFE, V. C. This was a bill filed by Mrs. Mackinnon against James Stewart and three persons named William Cripps, Edward William Burgess, and Joseph Hannah, to whom Stewart had conveyed all his property in trust for payment of such of his creditors as should execute that deed. Mrs. Mackinnon filed this bill in the character of a creditor of Stewart, under a decretal order of this Court, made on the 11th of May, 1848, in another cause, in which she was plaintiff and Stewart was sole defendant, by which decretal order Stewart had been directed to pay several sums of money, and also to bring a further sum of money into Court to be secured and invested for her benefit during her life. Stewart not having made any of the payments according to the order, Mrs. Mackinnon obtained a writ of *elegit* directed to the sheriff of Middlesex, and also a writ of sequestration against Stewart. But neither of these writs had produced any beneficial result to her. In this state of circumstances, she, on the 1st of March, 1849, instituted the present suit, alleging that, on the 20th of November, 1846, Stewart, by a deed of that date made between himself of the first part, the three other defendants of the second part, and the several other persons creditors of Stewart who should execute the deed of the third part, conveyed all his estate, real and personal, to the three other defendants, upon trust to sell and apply the money thereby produced in

payment of the debts of the parties thereto of the second and third parts ratably according to the amount of their debts. The bill then states that the deed was executed by only a few of the creditors of Stewart, and only a short time before the institution of the present suit, without consideration, and not by virtue of any bargain with Stewart, their debtor. The bill also states, that on the 24th of November, 1848, the plaintiff caused the decretal order of the 11th of May preceding to be duly registered in the Court of Common Pleas, pursuant to 1 & 2 Vict. c. 110. s. 19, so as to make it a charge on the real estate of Stewart. The prayer of the bill is, that the deed of the 20th of November, 1846, may be declared to be a mere voluntary deed of agency, and that the trustees may be restrained from setting it up against the plaintiff's writs of *elegit* and sequestration, and from disposing of any part of the property still remaining vested in them, or otherwise executing any of the powers conferred on them by the deed; and that it may be declared that on the expiration of a year from the 24th of November, the plaintiff will be entitled to an equitable charge for the sums decreed to be paid by Stewart, with consequential directions for making that charge available. Stewart, by his answer, admits the plaintiff's demand against him, and he also admits the execution of the deed of trust; but he says it was executed on an express agreement with the trustees that they should, out of the money coming to their hands, in the first instance pay the plaintiff her demand in full before the other creditors should receive any thing. I mention this passage in Stewart's answer merely in order at once to dispose of it by saying it has no reference to the case made by the plaintiff, and would give rise to an equity (if any) totally different from that asserted by the bill. The trustees by their answer insist on the deed, and allege it was executed by nearly all the creditors, (above thirty in number,) not only before the institution of this suit, but before the institution of the former suit, in which the plaintiff obtained the decree against Stewart, and this is proved to have been the case by the deposition of witnesses examined in the cause. The former bill against Stewart was filed on the 18th of June, 1847, and the deed is proved to have been executed by thirty-one out of thirty-four of the creditors, who have signed it on various days from the 4th of May to the 26th of June. It is true, indeed, that early in the month of May the plaintiff gave notice to the trustees of her intention to proceed against Stewart, but this is not material. Knowledge on the part of the trustees, or notice given to them, that the proceedings in equity were on the eve of being instituted by a party claiming to have, and who ultimately turned out to have, an equitable demand against the debtor, can have no bearing on the question—what is the true nature of the deed. On this, which is in truth the only question in the cause, I entertain no doubt whatever. This is clearly not a mere deed constituting the trustees the agents of the debtor, but a deed effectually creating certain trusts for the benefit of the creditors, and of which trusts they or such of them as have executed it have a right to insist on the performance.

The doctrine of this Court as to mere deeds of agency is perfectly

simple and intelligible. It is competent to any one to make another his agent or attorney to get in his property and apply it in payment of his debts, or in any other mode he may direct. And after he has done so, he may at his pleasure revoke the authority so given, and direct any other disposition of his property which he may prefer. What was really decided in *Garrard v. Lord Lauderdale* and other cases involving the same point was only this, that in such a case the conveyance of property to the agent makes no difference as to the right of revocation in the debtor. The party in whom the property has been vested is a mere trustee for the debtor by whom it has been conveyed to him. He still is the mere agent or attorney, or in the nature of an agent or attorney of the debtor, and must obey his directions as to the disposal of the property. On the other hand, it is abundantly clear on the authorities, that where a creditor is party to a deed whereby his debtor conveys property to a trustee to be applied in liquidation of the debt due to that creditor, the deed is as to the creditor irrevocable. A valid trust is created in his favor, and the relation between the debtor and trustee is no longer that of mere principal and agent. Of course, that which is true where a single creditor is the *cestui que trust* is at least equally so where there are many creditors. Nor does the creditor executing the deed become less a *cestui que trust* because he gives nothing to the debtor as a consideration for the trust created in his favor, or because it was the voluntary, unsolicited act of the debtor to create the trust. I never knew that any question had been raised on this subject, as against creditors who had executed the deed, and so made themselves *cestuis que trust*. Where they have not executed the deed, questions have often arisen how far, by having been apprised of its execution, and so perhaps been induced to do or abstain from doing something which may affect their interests, they may not have acquired the rights of *cestuis que trust*. This is the question referred to by Sir John Leach in *Acton v. Woodgate*, and by Sir E. Sugden in *Browne v. Cavendish*. But where, as in the present case, the creditors have actually executed the deed, I apprehend there is no longer any possibility of treating it as a mere voluntary deed of agency revocable by the debtor.

I have already stated that here the deed appears to have been executed by nearly all the creditors before the plaintiff instituted her former suit against Stewart, but it makes no difference in my view of the case whether the deed was executed before or after the institution of that suit, or even before or after the institution of this suit. Where the inquiry is—whether a deed has been executed with the fraudulent intention of defeating or delaying creditors, it may be very important to know when it was executed. But such an inquiry would be wholly beside the question, whether the deed is or is not revocable as being a mere deed of agency. And the whole of the plaintiff's supposed equity is made by her bill to rest on the ground that the deed in this case is a mere deed of agency, and not a deed creating a valid trust capable of being enforced by creditors against Stewart. She wholly fails to establish this proposition, on

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which alone her case depends. There is no suggestion of any fraud, nor indeed of any invalidity of the deed, except as being a mere revocable instrument. The plaintiff, therefore, having failed to establish a title to any equitable relief whatever, her bill must be dismissed with costs.—*Bill dismissed against all the defendants.*

 TETLOW v. ASHTON.¹

November 15, 1850.

Will — Construction — Heir at Law.

A testator devised and bequeathed all his real and personal estate to trustees upon trust (after certain life estates) for the heir at law of his family then living, whosoever the same might be:—

Held, that the next of kin of the testator, according to the Statutes of Distribution, had no interest under the above gift.

JOSEPH HORSFIELD, by his will, dated the 25th of September, 1838, devised and bequeathed all his real and personal estate to R. Ashton, Samuel Horsfield, and J. Sidebottom, upon trust to pay certain annuities and charges therein mentioned, and then to pay the income to Ralph Horsfield for his life. The will then proceeded as follows: "And should the said Ralph Horsfield die and leave lawful issue, such issue, if more than one, to be entitled to all my estates as aforesaid, share and share alike; if only one, then the whole of my said estates to that one child only; and, in the event of the said Ralph Horsfield dying without lawful issue, my will and mind is and are that the whole of my said estates, both real and personal, *go to the heir at law of my family then living, whosoever the same may be*; and I hereby order my trustees or their heirs, executors, administrators or assigns, or the survivor or survivors of them, or the heirs, executors, administrators or assigns of such survivor, to give up the whole of my estates, both real and personal, to such heir at law of my family then living as aforesaid."

The testator appointed his trustees his executors, and died in October, 1838, and his executors proved his will.

The bill in this case, which was filed by Z. Tetlow, H. Booth, and G. Booth, "on behalf of themselves and all other persons, now next of kin of the testator, according to the Statute of Distributions," against R. Ashton, Samuel Horsfield, and J. Sidebottom, stated the will of the testator, his death, and the probate of the will, and that Ralph Horsfield was then living, and had not any issue; and prayed for the accounts of the personal estate of the testator, and that it might be properly secured for their benefit.

R. Ashton put in one demurrer to the bill, and Samuel Horsfield

¹ 20 Law J. Rep. (n. s.) Chanc. 53.

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and J. Sidebottom put in another demurrer. These demurrers now came on to be heard.

Mr. James Parker and *Mr. Giffard*, *Mr. Russell*, and *Mr. Dickinson*, for the demurrers.

Mr. Malins and *Mr. Bilton*, for the bill.

The following cases were cited: *Gwynne v. Muddock*, 14 Ves. 488. *Vaux v. Henderson*, 1 Jac. & W. 388, *n.* *Mounsey v. Blamire*, 4 Russ. 384. *Gittings v. M'Dermott*, 2 Myl. & K. 69; s. c. 2 Law. J. Rep (N. S.) Chanc. 212.

KNIGHT BRUCE, V. C. This is a limitation of real and personal estate, in the nature of a contingent remainder or future conditional limitation "to the heir at law of my family then living;" that is, at a future period which he mentions. It is said that these words mean the testator's next of kin. I have not heard any reasonable argument in favor of this suggestion. The testator has used words both familiar to the law and colloquially familiar, which no person professional or unprofessional can misunderstand. I take the words, "the heir at law of my family," to mean either the person who should then be his heir at law, or the person who should then be his heir at law on his father's side. Each of these altogether excludes the claim here made. If there were any correcting or explanatory context, the case might be different. I give no opinion how the case would have stood if the word "heirs" had been used instead of "heir." On that I say nothing. Here is a gift of personalty and realty on a future contingent event "to the heir at law of my family." I think that the testator meant what he said. The persons making this claim have no color of title. Allow the demurrers.

Mr. Malins then asked that the defendants might be allowed only one set of costs, as the case on the demurrers was the same for all the defendants.

KNIGHT BRUCE, V. C., asked if the defendants appeared by the same solicitor, or if there was what might be called a malicious severance.

No such having been suggested, —

KNIGHT BRUCE, V. C., allowed both sets of costs.

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BALGUY v. BROADHURST.¹

November 19, 1850.

Pleading — Scandal and Impertinence — Exceptions — Allegations of Fraud.

Bill filed by the *cestui que trust* under a marriage settlement against the trustee to compel him to pay a sum of money, which the husband had covenanted to settle, but which covenant the trustee had neglected to enforce previously to the bankruptcy of the husband, which took place some years after his marriage. The bill alleged that for many years the husband was in prosperous circumstances, and the covenant ought then to have been enforced. The trustee, by his answer, stated as a reason for his not having been able to enforce the covenant, that the husband, at the time of his marriage, was in very needy and embarrassed circumstances, and continued so until his bankruptcy. The answer then set forth several transactions, alleged to have been fraudulently contrived by the husband, and that he had in various other matters, both previously and subsequently to his marriage, resorted to fraudulent means to supply his wants and avert discovery of his true position. The Master had allowed exceptions to such passages of this answer as contained allegations of fraud against the husband, on the ground that they were scandalous and impertinent: —

Held, upon exceptions to the Master's report, that where the bill alleged solvency, it was not irrelevant for the defendant to introduce a statement of fraudulent practices committed from time to time to conceal the fact of insolvency.

THE bill stated, that by a settlement made upon the marriage of the plaintiff, Emma B. Balguy, with the defendant, Bryan T. Balguy, the said Bryan T. Balguy, in consideration of the said intended marriage and in consideration of a legacy or sum of 2000*l.*, to which, upon the solemnization thereof, the said Bryan T. Balguy would become entitled in right of his intended wife, did covenant with T. Bent and the defendant, J. Broadhurst, the trustees of the said settlement, that he, the said Bryan T. Balguy, would, within six months after the marriage, pay to the said trustees the sum of 8000*l.*, with interest in the mean time, after the rate of 5*l.* per cent. per annum from the date of the marriage, or that he would otherwise secure to be paid unto such trustees the said sum of 8000*l.* and interest by mortgage of freehold estates. And it was thereby agreed that the said trustees should stand possessed of the said sum of 8000*l.*, upon trust to invest the same in government securities, and pay out of the dividends thereof, to the said Emma Balguy, during the joint lives of her and her husband, the sum of 100*l.* for her separate use, and pay the surplus of such dividends to the said Bryan T. Balguy; and upon the decease of either of them, to pay the whole dividends to the survivor; and after the death of the survivor, to stand possessed of the said sum of 8000*l.* for the benefit of the children of the marriage, to be paid to them in manner therein provided for.

The bill then stated that the marriage was duly solemnized, and that the other plaintiffs were the only issue living of such marriage; that the said T. Bent never accepted the trust reposed in him by the settlement, or in any manner acted therein; that the said J. Broadhurst, by accepting the said trust, became bound to enforce the performance by the defendant, Bryan T. Balguy, of his covenant to pay

¹ 20 Law J. Rep. (n. s.) Chanc. 55.

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or secure the sum of 8000*l.* within six months after the said marriage; that the said Bryan T. Balguy had never paid, or secured to be paid, such sum of 8000*l.*, and the same was allowed to remain due up to the time of the bankruptcy of Bryan T. Balguy, which took place in January, 1838; that although the defendant, Bryan T. Balguy, was, for some years after his marriage with the plaintiff, Emma Balguy, in prosperous circumstances, and fully able to pay the said sum of 8000*l.*, or to secure the payment thereof by mortgage, according to his covenant, the defendant, J. Broadhurst, never took any proceedings whatever to enforce the performance of the covenant; and the whole benefit thereof had been lost to the plaintiff by reason of the bankruptcy of the said Bryan T. Balguy; that no dividend has been paid, or was likely to be paid, to the creditors of the said bankrupt, and he had obtained his certificate, and was thereby discharged from any claim or demand upon him in respect of his said covenant. The bill, therefore, prayed that the said J. Broadhurst might be declared bound to make good the said sum of 8000*l.*, and that he might be ordered to pay the same into Court to the credit of the cause, and that the same might be secured for the benefit of the plaintiffs, according to the provisions of the settlement.

The defendant, J. Broadhurst, by his answer, stated that, from what he had ascertained, he believed that, so far from the said Bryan T. Balguy having, at the time of his said marriage, been a wealthy man and in prosperous circumstances, he was then, and continued thenceforth up to the time of his bankruptcy, in very needy and embarrassed circumstances, and wholly unable to pay the said sum of 8000*l.*, and that at the time of the marriage he owed and was still liable to various parties for various sums of money, altogether to a very large amount, and that such debts and liabilities had accumulated upon the said Bryan T. Balguy by reason of his not having the means, out of property possessed by him of any description, to pay them off and free himself therefrom, and that the said Bryan T. Balguy continued subject to heavy liabilities subsequently to the time of the said marriage, and up to the time of his bankruptcy, and that, during all the time aforesaid he was, in fact, insolvent, and that he had, even before his said marriage, been necessitated to resort to various fraudulent means to supply his wants and avert the discovery of his true position; and, in particular, the defendant stated that, in the year 1818, the said Bryan T. Balguy, by means of a bank power of attorney, obtained possession of and fraudulently applied to his own use a sum of 3000*l.* bank annuities, which, on the marriage of his first wife, was settled for the benefit of himself and his said wife, and the said Bryan T. Balguy led this defendant to believe that the proceeds of the sale of bank annuities had been placed out at mortgage, and he from time to time gave this defendant credit for the interest; that the said fraud continued undiscovered by this defendant until a few months before the bankruptcy of the said Bryan T. Balguy, when it was too late to recover from him the amount, and the said Bryan T. Balguy, in his balance sheet under his bankruptcy, inserted the defendant as a creditor for 3200*l.* in respect of the proceeds of the sale

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of the said bank annuities. The defendant then proceeded to detail other transactions in which the said Bryan T. Balguy had been engaged, and by which he alleged that various large sums of money had been fraudulently obtained; and the defendant further alleged that he believed the said Bryan T. Balguy had in various other matters, both previously and subsequently to his marriage, been compelled to resort, and had resorted, to fraudulent means to supply his wants.

Nine different exceptions were taken by the plaintiffs to such passages in the answer of the defendant, John Broadhurst, as contained allegations of fraud against the said Bryan T. Balguy, on the ground that they were scandalous and impertinent. The Master, before whom the exceptions were heard, allowed them all, and the cause now came on upon exceptions to the Master's report.

Mr. Rolt and *Mr. Lake Russell*, in support of the exceptions to the Master's report, contended that it was necessary for the defendant, in his answer, to set forth the reasons why he was unable to compel Bryan Balguy to fulfil his covenant. If the passages in the answer were in any way material to the issue of the solvency or insolvency of Bryan Balguy, they were not impertinent, and consequently not scandalous. These facts were absolutely necessary for the Court to be informed of at the hearing, and if they were not stated, further inquiries ought to be directed. The expressions used in the answer were, moreover, called for by the pointed form of the interrogatories. The sixth interrogatory was in these words: "Whether the defendant, Bryan Balguy, was not for some years or for some and what time after his marriage with the plaintiff, in prosperous circumstances, and whether not fully, or to some and what extent, able to pay the said sum of 8000*l.*, or to secure the payment thereof by a mortgage of freehold estates, according to his covenant; and whether the defendant, John Broadhurst, ever, and when, took any and what proceedings to enforce the performance of the said covenant, and whether or not the whole, or some and what part, of the benefit of the said covenant has not been since lost to the plaintiffs, and whether or not by the bankruptcy of the said Bryan Balguy, or how otherwise." The ninth interrogatory was of the same searching description: "Whether the defendant, Bryan Balguy, was not at the time of his said marriage, and whether not for many years, or some and what time afterwards, seized or entitled to real estates, or some and what estates, and whether not of the value of 15,000*l.* and upwards, or some and what value; and whether he was not for many years, or some and what time, after his marriage, perfectly competent to perform his covenant, and whether he might not have been compelled to perform the same if the defendant, John Broadhurst, had taken proper proceedings for that purpose, or how otherwise, and how does the defendant, John Broadhurst, make out the contrary." The case of *Robson v. Lord Brougham*, 19 Law J. Rep. (N. S.) Chanc. 465, was a direct authority on this point; where the Vice Chancellor of England held, that the defendant was entitled to set forth his reasons for disbe-

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lieving the accuracy of the plaintiff's accounts, owing to certain private transactions which had taken place between the plaintiff and the defendant, unconnected with the question in the cause. The bill alleged that Bryan Balguy was in good circumstances, and it was necessary for the defendant to state what he had, because, if not impossible, it was at any rate most improbable, that a rich man would have had recourse to the fraudulent practices alleged, and consequently they were pregnant evidence of his poverty. The following cases were also cited: *Maitland v. Bateman*, 13 Law J. Rep. (N. S.) Chanc. 273. *Pearson v. Knapp*, 1 Myl. & K. 312. *Everett v. Prythgerch*, 12 Sim. 365; s. c. 11 Law J. Rep. (N. S.) Chanc. 54.

Mr. Bethell and *Mr. Amphlett*, for the Master's report, contended that all the expressions in the defendant's answer were irrelevant and grossly scandalous. The passages excepted to, both in substance, and in the mode and form in which they were stated, were not pertinent. It was clear that you might state a material fact in an impertinent manner, so as to render the whole impertinent, and it might be so mixed up and diluted in a series of impertinent matters, that it might be impossible to separate them. The passages excepted to were not material to the issue. Every thing material was stated in an unobjectionable form, and was not challenged, but the rest was only introduced to give needless pain to the individual attacked; and in this case it was the more objectionable, as the passages complained of were contained in the answer of one defendant, and against another defendant. So far as the answer involved the assertion of the necessitous circumstances of Mr. Balguy, it was a repetition; and so far as it imputed fraud, it was irrelevant. The alleged fraud was not only not conclusive evidence, but it was no evidence at all of Mr. Balguy's insolvency. Some of the passages complained of related to what took place before Mr. Balguy's marriage with the plaintiff. These were clearly irrelevant, as they did not affect his circumstances at the period when the covenant was to have been enforced. If such statements were allowed in an answer, a defendant might rake up all the unfortunate or immoral acts of a man's life, for the purpose of annoying him. Supposing he had committed fraudulent acts, they would not show that he was in such circumstances as to be unable to perform his covenant.

Mr. Lake Russell, in reply, cited *The Attorney General v. Rickards*, 6 Beav. 444; s. c. 14 Law J. Rep. (N. S.) Chanc. 363; on appeal, 12 Cl. & F. 30.

ROLFE, V. C. The matter excepted to consists mainly of statements of fraudulent acts resorted to by the husband for raising money partly before and partly after his marriage. The passages are prefaced with this statement, that the defendant had, even before his marriage, been necessitated to resort to fraudulent means to supply his wants and avert the discovery of his true position. I do not think that this is irrelevant. It is necessary to state, as a reason for his not

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being able to perform his covenant, that he had been compelled to resort to these practices. If a man is charged with being a rogue, that is nothing; but where the question is, whether any benefit would have arisen to the estate if the defendant had taken proceedings to compel him to pay a sum of money, it is, I think, quite competent for the defendant to say that he had been fraudulently obtaining money to cover his expenses. The bill contains statements of facts to show his solvency at the time when he ought to have executed his covenant, and that he was then possessed of certain property. I should not be dealing an equal measure of justice if I allowed the bill to state facts showing solvency, and refused to allow the answer to state facts showing insolvency. It does not appear to me that such statements are irrelevant. Whether the word "fraud" is coupled with such statements, is of no importance. The last exception is to these words: "The defendant believes that in various other matters the said Bryan Balguy had, both previously and subsequently to his marriage, been compelled to resort to fraudulent means to supply his wants." That follows the same principle, and it appears to me it is relevant matter. The plaintiffs state facts to show solvency, and the defendant meets it by showing hopeless insolvency, and by stating that the person had been guilty of fraudulent practices from time to time, to conceal his insolvency.—*Exceptions to the Master's report allowed.*

In re THE DIRECT BIRMINGHAM, OXFORD, READING AND BRIGHTON RAILWAY COMPANY, *Ex parte* WALSTAB.¹

November 14, 1850.

Company — Winding-up Act — Contributory — Shareholder.

E. Walstab had taken shares in the above company, and had paid the deposit, but had since recovered back the deposit in an action at law against one of the directors:—

Held, that she was not liable as a contributory under the Winding-up Act.

THIS was a motion that the decision of the Master in winding up the above companies, whereby the name of Mrs. Elizabeth Walstab was retained on the list of contributories, might be reversed.

It appeared in this case that Mrs. Walstab had applied for shares in the company, and had received a letter of allotment in the following form: "Letter of allotment— not transferable— Direct Birmingham, Oxford, Reading and Brighton Railway. Capital 2,000,000*l.* in 80,000 shares of 25*l.* each, deposit 2*l.* 12*s.* 6*d.* The committee of management have allotted to you thirty shares in this undertaking, and I am desired to request you will pay the deposit of 2*l.* 12*s.* 6*d.* per share, amounting to 78*l.* 15*s.* into one of the under-mentioned

¹ 20 Law J. Rep. (n. s.) Chanc. 58.

Walstab, *Ex parte*.

banks, on or before Friday, the 24th day of October, 1845, or this allotment will be null and void. The letter, with the banker's receipt appended hereto, will be exchanged for scrip upon your presenting it at the office of the company, and executing the parliamentary contract and subscribers' agreement, which will be at the above offices on and after the 27th of October, and due notice will be given when the deeds will be sent into the country. I am your obedient servant, J. B. Rayner, secretary."

Mrs. Walstab paid her deposit, but afterwards brought an action against Mr. Spottiswoode, one of the managing directors of the company, for the recovery back of the deposit.

The action was tried, before the Court of Exchequer, on the 12th of June, 1846, 15 Mee. & W. 501; s. c. 15 Law J. Rep. (N. S.) Exch. 193; where it was held, that there was sufficient evidence of the final abandonment of the project, and that on its abandonment under the circumstances stated, the plaintiff was entitled to recover back, as money had and received to her use, the whole sum paid by her.

Mr. Rolt and Mr. Bagshawe appeared in support of the motion, and contended, that Mrs. Walstab ought to be excluded from the list of contributories, on the ground that, having received back her deposit, the contract was rescinded, and that she was, therefore, no longer a contributory.

Mr. Bethell and Mr. Roxburgh, in support of the Master's report, contended, that Mrs. Walstab was still a contributory under the Winding-up Act, and liable to be placed on the list; that the contract was not rescinded by the repayment of the deposit. The allotment of shares to her was by the company, and the contract was entered into with the company, but the action to recover back the deposit was not brought against the company, but against an individual member of the company.

ROLFE, V. C., said this case came under the same rule as that which he had applied to the cases of *Ex parte Maudslay, ante*, and *Ex parte Carmichael, ante*. The Master's decision must, therefore, be reversed, and Mrs. Walstab's name must be removed from the list of contributories. The costs of all parties of this application, and of the proceedings before the Master, to come out of the estate.

 Follett v. Jefferyes.

FOLLETT V. JEFFERYES.¹

November 6; December 2, 1850.

Solicitor and Client — Confidential Communications — Production — Sufficiency of an Answer.

The defendant, J. Taylor, was entitled to an annuity under a will, subject to a proviso, that if he attempted to charge or dispose of such annuity, it should be applied by the executors for the benefit of the said J. Taylor or his wife, or such other persons mentioned in the will as the executors should think fit. A writ of sequestration having issued against J. Taylor, he assigned his annuity to a trustee for the benefit of his wife. The sequestrators filed this bill to set aside the assignment, alleging that it was a fraudulent arrangement to defeat their claims. The wife of the defendant, J. Taylor, by her answer, stated that the object of the assignment by J. Taylor was to effect a forfeiture of the annuity, in the expectation that the executors of the testator would apply it, or some portion of it, for the benefit of his wife, and at the same time to defeat the claims of the plaintiffs. She submitted that she was not bound to produce the documents and communications which passed between her and her solicitor relative to the assignment. The answer was excepted to for insufficiency:—

Held, that there was no fraud in this transaction; that it was one as to which it was perfectly lawful for a client to ask, and for a solicitor to give professional advice, and the documents relating to it were within the admitted rule of privilege.

THE facts of this case, which came on upon exceptions to the Master's report, as to the sufficiency of an answer, will be found fully stated in the judgment of the Vice Chancellor.

Mr. Bethell and *Mr. Kinglake*, for the plaintiffs, contended that the defendant was bound to produce the documents relating to a transaction alleged by the bill to have been devised between the defendants and their solicitor for a fraudulent object. An annuity was given to J. Taylor until he should charge or dispose of it. He did dispose of it, by assigning it to a trustee for the benefit of his wife, and this transaction was effected for the express purpose of defeating the claims of the plaintiffs who were his creditors. This was evidently a fraud upon the creditors, and the documents now sought for related to the preparation of the very deed which it was the object of the plaintiff's to set aside on the ground of fraud. The plaintiffs alleged that these communications would prove the fraud complained of, and it was an acknowledged rule of the Court, that the plaintiffs had a right to production of such documents. The fraud alleged was, that the client and the solicitor were desirous of effecting an arrangement, the object of which was to create a breach of the proviso against anticipation in the codicil, and thereby to enable other persons entitled to the annuity, upon the forfeiture taking place, to have the benefit of the annuity, and that the plaintiffs' claims might be defeated. The apparent object of the deed, therefore, was to do one thing; but the intention was, that it should effect a different thing altogether. It was, in fact, a cloak to conceal the real object of the transaction: that was the fraud complained of, and the plaintiffs were therefore entitled to all the communications which took

¹ 20 LAW J. REP. (N. S.) CHANC. 65.

place between the client and the solicitor with regard to the transaction. The solicitor in this case was also the trustee to the deed of assignment, and was, therefore, acquainted with all that was intended to be done.

Mr. J. Parker and *Mr. Freeling*, for the defendant, *Mrs. Taylor*, relied upon the principle that communications between a party and his counsel or solicitor, relating to matters in dispute in the cause, were protected from disclosure. The plaintiffs could not deprive the defendant of this protection by merely alleging that the defendant and her solicitor had been parties together in an illegal act, for if that were so, such an allegation might be always made, as it was in this case, without foundation, and the principle of protection would be destroyed. The fraud alleged here was simply the withdrawing the annuity from the power of the sequestrators. For the purpose of doing so, *Mr. Taylor* consulted with his professional advisers as to the best method of effecting the object, and the result was, that an assignment was executed, which had the effect of producing a forfeiture of the annuity, and giving it to the parties entitled upon such forfeiture. There was nothing fraudulent in such a transaction, and the communications which passed, relative to the manner of effecting *Mr. Taylor's* object, ought to be protected as privileged communications.

Mr. Stuart appeared for another of the defendants.

The following cases were cited during the argument: *Reymell v. Sprye*, 10 Beav. 51; s. c. 11 Beav. 618; 16 Law J. Rep. (N. S.) Chanc. 117. *Reece v. Trye*, 9 Beav. 316. *Lord Walsingham v. Goodricke*, 3 Hare, 122. *Holmes v. Baddeley*, 1 Phil. 476; s. c. 14 Law J. Rep. (N. S.) Chanc. 113. *Pearce v. Pearce*, 1 De Gex & Sm. 12; s. c. 16 Law J. Rep. (N. S.) Chanc. 153. *Greenough v. Gaskell*, 1 Myl. & K. 98. *Dendy v. Cross*, 11 Beav. 91. *Herring v. Cloberry*, 1 Phil. 91; s. c. 11 Law J. Rep. (N. S.) Chanc. 149.

BOLFE, V. C. This was a case of exceptions to the Master's report as to the sufficiency of the answer of the defendant, *Henrietta Savill Taylor*, the wife of the defendant, *John Taylor*. The plaintiffs are Commissioners of Sequestration appointed in a cause of *Cooper v. Taylor and others*, in which the defendant, *Taylor*, had been ordered to pay a large sum of money into court. Having made default in so doing, a writ of sequestration issued against him. The object of the present suit instituted by the sequestrators is to set aside a deed, executed by *Taylor*, purporting to assign what was an annuity of 200*l.*, to which he was entitled under the will and codicil of *Thomas Cape*, and by reason of which assignment, the plaintiffs allege that they have been improperly prevented from possessing themselves of the annuity. *Taylor's* title to the annuity arose from the second codicil to the will of a *Mr. Cape*, which is as follows: "I direct that my executors and trustees do and shall, as soon as conveniently may be after my decease, appropriate and set apart sufficient

funds whereby or wherewith to pay and satisfy the two annuities following, namely, an annuity of 200*l.* free and clear of all income or property tax or other deductions, for the life of Captain John Taylor, of Lopewood, in the county of Southampton, another of the sons of my dear wife by her former husband, (meaning the defendant, John Taylor,) and a like annuity of 200*l.* free of all deductions as aforesaid, for the life of Alexander Taylor, Esq., also another of the sons of my dear wife by her former husband, and now residing at Versailles in the kingdom of France, (meaning the defendant, Alexander Taylor,) and so that the same two annuities may be paid and payable in equal portions, on the 25th of March, the 24th of June, the 29th of September, and the 25th of December in each year, the first quarterly payment thereof respectively to be made on such of the said days as shall happen next after my decease; and I further direct that my said executors and trustees do and shall as regards the first-mentioned annuity," that is, the annuity now in question, "until John Taylor shall assign, charge, or otherwise dispose of the same or any part thereof by way of anticipation, or attempt or agree so to do, or shall do some act whereby the said first-mentioned annuity, if payable to himself, would become vested in some other person or persons, pay the same to the said John Taylor for his own proper use and benefit; but if the said John Taylor shall assign, charge, or otherwise dispose of the said first-mentioned annuity, or any part thereof by way of anticipation, or attempt or agree so to do, or shall do some act whereby the same annuity, if payable to himself, would become vested in some other person or persons, then I direct, that my said executors and trustees do and shall thenceforth, during the remainder of the life of the said John Taylor, from time to time pay, apply and dispose of the said first-mentioned annuity in such manner for the maintenance and support or otherwise for the benefit of all or any one or more exclusively of the other or others of them, the said John Taylor and his present or any future wife and his issue, (if any,) and the said Alexander Taylor, if living, and the person or persons for the time being entitled to my residuary personal estate under my will and this codicil, as my said executors and trustees shall in their absolute and uncontrolled discretion, and without being in any way liable for the exercise of such discretion, think proper. And I further direct that my said executors and trustees do and shall, as regards the secondly-mentioned annuity of 200*l.*, until the said Alexander Taylor shall assign, charge, or otherwise dispose of the same or any part thereof by way of anticipation, or attempt or agree so to do, or shall do some act whereby the said secondly-mentioned annuity, if payable to himself, would become vested in some other person or persons, pay the same to the said Alexander Taylor for his own proper use and benefit; but if the said Alexander Taylor shall assign, charge, or otherwise dispose of the said secondly-mentioned annuity, or any part thereof, by way of anticipation, or attempt or agree so to do, or shall do some act whereby the same annuity, if payable to himself, would become vested in some other person or persons, then I direct that my said executors and trustees do and shall thenceforth, during the remainder

of the life of the said A. Taylor, pay and apply and dispose of the said secondly-mentioned annuity in such manner for the maintenance and support, or otherwise for the benefit of all or any one or more, exclusively of the other or others of them, the said A. Taylor and his issue, (if any,) and the said J. Taylor, if living, and the person or persons for the time being entitled to my residuary personal estate under my will and this codicil, as my executors and trustees shall in their or his absolute and uncontrolled discretion, and without being in any way liable for the exercise of such discretion, think proper."

Cape, the testator, died in January, 1848, and the will and codicil were soon afterwards proved by his executor, the defendant, Jefferyes, who possessed assets more than sufficient to pay his debts and legacies. The original bill, after stating these facts, and that the plaintiffs had made during the spring of the year 1848 many ineffectual attempts to get possession of the annuity, contains the following charge: "That some time after the 17th of May last," that is, the 17th of May, 1848, "the defendants, J. Taylor, and Henrietta Savill his wife, Jane Cape, and St. John Jefferyes, who acted with a view to his own interests under the said will and codicil, and also with a view to the interests of his said wife and his said two children, consulted with each other and with their respective solicitors, in order to devise some means for defeating the title of the plaintiffs to the said annuity so bequeathed as aforesaid to the said J. Taylor:" [the plaintiffs being the sequestrators, and who would have a right to seize the annuity,] "and they at length determined that the said J. Taylor should execute a deed for assigning, and should affect to assign the said annuity to his wife, in order to make it appear that such annuity had been forfeited in pursuance of the proviso in that behalf contained in the said codicil, and that the benefit of the said annuity belonged to the persons to whom the same was bequeathed by the said testator in the event of its being forfeited; and it was also arranged, that the power of appointment given in the event of such forfeiture as aforesaid to the trustees and executors of the said testator, should be executed by the said defendant, St. John Jefferyes, in manner understood between him and his said wife and children, and the said John Taylor and H. S. his wife, and the said Jane Cape. And the plaintiffs charge, that in pursuance of the said determination and arrangement, an instrument purporting to be an indenture was actually prepared and engrossed by the said Messrs. Holme & Co., and was signed, sealed and delivered by the said defendant, J. Taylor, and also by Thomas Bristowe Young, one of the defendants hereinafter mentioned, who is a partner in the said firm of Messrs. Holme & Co.," who was the solicitor of Mrs. Cape.

Then the bill goes on to charge "that the pretended indenture being the instrument so signed, sealed and delivered as last aforesaid, purports to be an indenture, dated the 24th of May, 1848, and made between the said defendant, J. Taylor, of the one part, and the said defendant, Thomas Bristowe Young, of the other part; and thereby, after reciting the will and codicils and death of the said testator, and also reciting that the said defendant, J. Taylor, in consideration of the natural love and affection which he had for his wife, the said defendant,

Henrietta S. Taylor, and of the benefits he had received from her, and in order to make a better provision for her, had determined and agreed to assign the said annuity of 200*l.* to which he was so entitled under the said recited codicil unto the said defendant, Thomas B. Young, his executors, administrators and assigns, in trust, for the sole, separate, and exclusive use and benefit of the said defendant, H. S. Taylor, her executors and administrators in the manner thereafter mentioned, and that the said defendant, T. B. Young, had agreed to accept the said trust:—it is by the said pretended indenture witnessed, that for effectuating the said determination and agreement, and in consideration of the natural love and affection which the said J. Taylor had for his said wife, the defendant, H. S. Taylor, and of the sum of 10*s.* sterling by the said defendant, T. B. Young, to the said J. Taylor in hand paid at or before the execution of those presents, the receipt whereof was thereby acknowledged, he, the said J. Taylor, did by those presents bargain, sell, assign, transfer and set over unto the said T. B. Young, his executors, administrators and assigns, all that the aforesaid annuity or yearly sum of 200*l.* to which he, the said J. Taylor, was entitled under or by virtue of the said recited codicil, bearing date the 16th of June, 1847, as in the said pretended indenture alleged, and all arrears and future payments thereof, and all the right, title, interest, trust, property, benefit, claim, and demand whatsoever, both at law and in equity, of the said J. Taylor, in to or out of the same premises: to have, hold, receive, and take the said annuity or yearly sum of 200*l.*, and other the premises thereby assigned and transferred unto the said defendant, T. B. Young, his executors, administrators and assigns, for and during the life of the said J. Taylor, and for all other the estate, term, and interest of the said J. Taylor therein, in trust, nevertheless, for the sole, separate and exclusive use and benefit of the said defendant, H. S. Taylor, her executors and administrators.”

Then there is a charge “that no consideration whatever was given for that pretended assignment of the said annuity, and that the same was prepared, signed, sealed and delivered for the mere purpose of defrauding the plaintiffs as such sequestrators as aforesaid, by making it appear contrary to the fact that the said J. Taylor had really attempted to assign and alien the said annuity, and that the same became forfeited in pursuance of the proviso contained in the said second codicil; and the plaintiffs charge that the said instrument was not prepared, signed or sealed, with a view of really vesting or really attempting to vest the said annuity in the said defendant, T. B. Young, and the said defendant, T. B. Young, at the time of executing the same, had been advised, and he believed and well knew that the said annuity would not actually pass to him as such trustee as aforesaid; and the plaintiffs charge, that under the circumstances aforesaid the preparation, signing, sealing and delivering of the said pretended indenture were a mere fraud, and that such pretended indenture is wholly void as against the plaintiffs.” Then there is a charge as to the assets of the testator, Cape, and to which I do not think it is material to advert. The original bill prayed that it might be declared that the instrument so prepared was fraudulent and void as against the

plaintiffs, and then that there might be an account taken of the assets of Cape and consequential directions, with a view to what was to be done, assuming the deed to be void and consequently set aside.

Mrs. Taylor, by her answer to the original bill, states as follows: she says she believes "that at the time, and in the manner in that behalf mentioned, a *bonâ fide* attempt was made by the defendant, J. Taylor, to assign the annuity;" and then she says, "that J. Taylor, upon becoming aware of the bequest to him of the annuity, was desirous that the same should be settled or secured upon or for the benefit of this defendant, his wife; and that accordingly the defendant, J. Taylor, and this defendant consulted together, and with the said defendant, T. B. Young, as their solicitor, as to the practicability of effecting such desire, and as to the mode in which the same should be carried into effect." Then she says, "she believes that it was the desire and intention of the testator, T. Cape, that no portion of the said annuity by him bequeathed, to the said J. Taylor, should in any manner, or by any parties, be made or become payable to any other person than the said J. Taylor himself, or the other persons mentioned or referred to in or upon his, the said testator's, second codicil, and particularly that the said annuity should not be liable to be taken in execution, or otherwise appropriated, by the creditors of the said J. Taylor." Then she says, "that she and the defendant, J. Taylor, were advised that under the provisions of the second codicil no assignment of the said annuity in favor of her would be effectual against the claims of the parties for whose benefit the same are in the said codicil directed to be applied, in the event of the said J. Taylor's attempting to alienate the same, in case such other parties should insist upon the forfeiture of the said J. Taylor's interest therein; but, nevertheless, the said defendant, J. Taylor, resolved, under the circumstances herein stated, to execute an assignment of the annuity to a trustee for this defendant, in the hope, as she believes, that if the forfeiture of the annuity were insisted upon, the said testator's trustees and executors might, in the exercise of the discretion given to them by the said codicil, apply the said annuity or some part thereof to or for the benefit of this defendant." Then she says, "that she was aware of such last-mentioned resolution on the part of the said J. Taylor, and was willing to accept any benefit which might accrue to her, either by means of the assignment of the annuity to a trustee for her, or of the exercise of the discretionary power vested in the executors and trustees under the said codicil; but the execution of such agreement was not otherwise arranged between this defendant and the said other defendants, J. Taylor, and T. B. Young, or either of them."

Then she says, "that under the circumstances herein stated, and with a view of effecting such the desire of the defendant, J. Taylor, as aforesaid, and also of effecting the desire and intention of the testator, the said defendant, J. Taylor, with the privity of this defendant, did determine, upon the suggestion and advice of counsel, that he, the said J. Taylor, should actually assign the said annuity to a trustee for this defendant, so as effectually to divest the interest of him, the

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aid J. Taylor, therein, and either to secure the annuity for this defendant's benefit, or to effect a forfeiture of the said annuity, and thereby to prevent the same from being taken by the plaintiffs under the said Commission of Sequestration, and to enable the trustees of the testator's will and codicil to exercise the discretion given to them by the second codicil, in the event of any attempt by the said J. Taylor to alienate the annuity." Then she admits, "that she and the other defendants did, at the time, in the said bill in that behalf mentioned, under such circumstances, and with such view and intention, as hereinbefore in that behalf mentioned, but not further or otherwise, consult with the said other defendant, T. B. Young, as their solicitor, in order to devise some means of securing the said annuity for this defendant's benefit, and thereby of defeating the claims under the sequestration." And then she admits the execution of the indenture, and she says, "that a great many letters passed between her and Mr. Young on the subject, and a case was taken for the opinion of counsel, and she has set out what is called all the documents in her possession that relate to any matters in the cause;" and she says, "that those documents contained in the second part of the schedule consist of a case for the opinion of counsel, and opinions of counsel and confidential communications between this defendant and the other defendant's solicitor, with reference to the matters in question in this suit, and to the defence of the defendant against the claims made by the plaintiffs in this suit; and she submits and humbly insists, that she is not bound and ought not to be compelled to produce the same."

Upon the coming in of this answer, a motion was made before the late Vice Chancellor of England, for the production of the documents mentioned in the second part of the schedule. The motion was resisted by the defendants, Mrs. Taylor and Mr. Young, who contended that the documents were all within the class of privileged communications. His Honor, however, thought differently, and ordered their production, on the ground that that they all related to the very deed impeached by the bill. 18 Law J. Rep. (N. S.) Chanc. 389. There was then a motion, by way of appeal, to Lord Cottenham, who discharged the order of the Vice Chancellor, being of opinion, that none of the authorities warranted the distinction on which the Vice Chancellor had proceeded. His Lordship, according to the report in the *Jurist*, vol. 13, p. 973, added, "That, no doubt, pleadings might be so framed as to make a special case connecting the discovery sought with the fraudulent act complained of, so as to take the case out of the ordinary rule; but that here no special case was made, and the allegations in the answer brought the case within the ordinary rule."

After this order of Lord Cottenham, the plaintiffs amended their bill by introducing the following charge: "That after the defendants, J. Taylor and Henrietta his wife, and their solicitors, had become acquainted with the contents or purport of the said Thomas Cape's will and codicils, but before the 24th of May, 1848, the said Messrs. Holme & Co., as the solicitors of the said J. Taylor and Henrietta his wife, stated a case for the opinion of counsel, and in such case the fact of the said writ of sequestration having issued was stated, and a copy or

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statement of the said codicil, bequeathing the said annuity, was contained in or accompanied the case; and the plaintiffs charge, that before the signing the said alleged indenture of the 24th of May, 1848, the said defendants, J. Taylor and Henrietta his wife, respectively, wrote letters to, and received letters from, the said T. B. Young, the trustee named in the indenture of the 24th of May; and the plaintiffs charge that the letters so written and received related to the subject of the said last-mentioned annuity, and to the preparing of the last-mentioned indenture, and to the real purpose for which it was proposed to execute the same, and to the expediency of the said J. Taylor, voluntarily doing some act to forfeit or determine his right to the same, and to the means of defeating the title of the plaintiffs to the said annuity, and securing the benefit thereof for the said defendants, Henrietta Taylor, Jane Cape, Henrietta Cordelia Jefferyes, John G. Jefferyes, Sir George Conway Colthurst, and Louisa Jane Colthurst, or some of them." And then it is charged, "that the said case, opinions, and letters show what was the real intention of the said defendants, J. Taylor and Henrietta his wife, and T. B. Young, in becoming parties to the said indenture of the 24th of May, 1848; and they show, as the fact was and is, that the plan of preparing and executing such indenture was resorted to for the purpose of effecting a forfeiture of the said annuity, and a determination of the title of the plaintiffs and the said J. Taylor thereto, and in order to defeat the title of the plaintiffs as such sequestrators, as aforesaid, and was not resorted to for the purpose of really and effectually vesting the said annuity in the said Thomas B. Young, upon the trusts in the same indenture declared."

And then the plaintiffs charge, "that in and by the said case counsel were requested to advise, whether a forfeiture or determination of the said J. Taylor's interest in the said annuity might not be effected by the said J. Taylor executing an assignment thereof, or by some other and what means, and to advise generally as to the best means of withdrawing the annuity, so as aforesaid bequeathed to the said J. Taylor, from the power of the plaintiffs as such sequestrators." And then the plaintiffs charge, "that counsel wrote an opinion upon the case submitted to him, and advised that a *bonâ fide* assignment of the said annuity, by the said J. Taylor, if such assignment were possible, would determine his right thereto, and the right of the plaintiffs, as claiming under him; but he also advised that no estate or interest in the said annuity would or could, under any assignment, become vested in the person or persons to whom the same might purport to be assigned, and that a deed purporting to be an assignment of the said annuity, but not really passing, and not intending to pass or assure the same, would be merely colorable, and would not affect the title of the plaintiffs as such sequestrators."

The defendant, Mrs. Taylor, having been called to answer these amendments, put in an answer, by which in substance she declines to disclose any thing as to the contents of the case or the letters. Her answer was excepted to on that account, but the Master disallowed the exceptions. The plaintiffs then excepted to the Master's report, and so the matter comes before me.

I have been thus particular in stating the pleadings and referring to what has already been done, because it will, I think, be manifest, on considering the proceedings up to the present time, that the question for my decision is brought within very narrow limits. The question before Lord Cottenham did not, it is true, arise on exceptions to the answer; but his Lordship's decision proceeded on principles which would certainly have been applicable to such a case. On the same grounds on which he decided that the defendant was not bound to produce the case and letters, he would on the record, as it was framed when the matter was before him, have decided that she was not bound to answer interrogatories calling on her to set forth the contents or the purport and effect of them. The single question, therefore, on which I have to decide is, whether the amendments which have been made in the charges of the bill are such as to vary the rights of the plaintiffs, with respect to the discovery to which they are entitled; in other words, whether, adopting the language of Lord Cottenham, the plaintiffs have now on the amended bill made a special case, connecting the discovery sought with the fraudulent act complained of, so as to take the case out of the ordinary rule. I think they have not. For such a purpose it is essential that the act complained of should, on the face of the bill, appear to be a fraud. Such was the case of *Reynell v. Sprye*. There the client penned a letter, to be copied and sent to him by the attorney, as if emanating from the attorney himself, with a view to its being shown to the plaintiff himself, so as to lead him to sell his estate at an undervalue. Lord Langdale held that there was no privilege protecting the client or the attorney from producing the letter. So, in the present case, if the annuity had been forfeitable, not on any assignment or attempt to assign, but only on an assignment by way of sale, and the solicitor had been party, with Taylor, to a scheme for framing a deed which should purport to be, but should not in truth be, a sale, that would be a fraud, and both client and solicitor would be bound to discover all that had passed between them in reference to the preparation of such a deed. So again, if the forfeiture had been made to depend on the assignment having been made before a particular date, and the solicitor had been party to a plan for getting the deed ante-dated; and many similar cases may be suggested. But here I can discover no fraud whatever in the transaction, whether as stated by the plaintiffs or the defendant. It may, indeed, not be a very moral act in a debtor so to dispose of his property as that his creditors may be effectually prevented from getting execution; but such an act *per se* is no fraud, if the disposition is one which the law allows; and the amended charges in this bill amount to no more than this, that the object of Taylor was, not really to vest the property in Young for the benefit of his wife, (for that, by the express provision of the codicil, he cannot do,) but to make an assignment which should cause a forfeiture, and to give the property to the parties entitled on the happening of the forfeiture. This is the account of the transaction as stated both in the bill and in the answer; and in my opinion this was not a fraud, according to any definition of

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fraud which can be recognized in this court. The transaction as stated on this bill is one as to which it was perfectly lawful for the client to ask, and for the solicitor to give professional advice; and this seems to me to be the true test in a case like the present, as to whether what has passed is or is not privileged. It is distinctly sworn that the documents in question contain or relate to advice so asked for and given, with reference to the very question now in dispute; and the case, therefore, is one which I consider as coming within the admitted rule of privilege. I am, therefore, of opinion, that the Master is right, and the exceptions to his report must be overruled.

It may not be unfit that I should repeat an observation I made in the course of the argument, namely, that it is not accurate to speak of cases of fraud, contrived by the client and solicitor in concert together, as cases of exception to the general rule. They are cases not coming within the rule itself, for the rule does not apply to all which passes between a client and his solicitor, but only to what passes between them in professional confidence; and no Court can permit it to be said, that the contriving of a fraud can form part of the professional occupation of an attorney or solicitor. The costs will follow, as a matter of course.

GOODE & ANOTHER v. WATERS & ANOTHER.¹

December 2, 1850.

Tithes — Validity of an Award — 53 Geo. 3, c. 127, pleaded at the Bar — Bill for an Account of Tithes.

In a suit for an account of tithes, the defendants set up an award, which declared that a certain sum should be paid in lieu of tithes, provided the whole lands were subject to tithes; but if only subject to tithes according to a specified terrier, then a different sum was awarded. The defendants' counsel also set up at the hearing the statute 53 Geo. 3, c. 127, as a bar to the recovery of tithes for more than six years. The statute was not pleaded by the answer of the defendants:—

Held, that the award, not being final, was void, but that the plaintiffs were only entitled to an account of tithes for six years before the filing of the bill.

THIS was a suit instituted by the plaintiffs, Henry Goode and George Goode, for an account of tithes from the 25th of December, 1834, until the 25th of December, 1841, in respect of three farms, known as Pantdwsfor, Treventy and Foxhole, situate within a district called the Grange, in the parish of Llanfihangel Abercowen, in the county of Glamorgan. The plaintiffs were entitled to two thirds of the tithes; the defendant George Bowen was entitled to the remaining one third. The defendant Waters was the occupier of the farms during the period in question. The tithable land of the farms was 529 acres, but the defendant Waters had insisted that a much smaller quantity was subject to tithes. The defendant G. Bowen had put in

¹ 20 Law J. Rep. (N. S.) Chanc. 72.

an answer, disclaiming his interest in the tithes during the time for which the plaintiffs sought an account.

It appeared that on the 24th of October, 1835, there being some disputes between the plaintiffs and the defendant J. Waters, in respect of these tithes, a memorandum of agreement was entered into between them, whereby, in order to avoid the inconvenience of the defendant Waters, setting out the tithes in kind, as to the said farms of Treventy and Foxhole, it was agreed that the two thirds of the said tithes should be paid by J. Waters, by an annual rent or composition, the amount thereof to be ascertained and fixed by certain persons therein mentioned, and such rent or composition was to be paid from the 29th of September, 1835, and to be continued half-yearly during the life of the said J. Waters.

In pursuance of this agreement, the two persons nominated made their award on the 14th of October, 1836, and which, after referring to the agreement, was in the following terms: "We do hereby accordingly award and declare that the sum of 23*l.* (being two thirds of all tithes) be annually paid by the said J. Waters to the said H. P. Goode and G. Goode, from Michaelmas, 1834, during the lifetime of the said J. Waters, provided the whole of the said lands (containing about 374 acres) be subject to the full payment of tithes; but if only subject to tithes according to the copy of a terrier put into our hands by G. Goode, bearing date the 29th of April, 1729, then the annual sum of 13*l.*, being two thirds of such tithes, be annually paid by the said J. Waters to the said H. Goode and G. Goode, instead of 23*l.* before mentioned." The plaintiffs refused to act upon this award, as not being final, and not having taken in the whole of the lands subject to tithe. Waters, however, relied upon its validity, and from time to time tendered the annual rent to the plaintiffs, who refused to accept the same.

The bill was filed in the month of June, 1844, and the plaintiffs thereby, after insisting upon the invalidity of the award, alleged, as the fact was, that the tithes had, on the 31st of December, 1841, been commuted, and an apportioned rent charge of 60*l.* 12*s.* 9*d.* paid in lieu of tithes, which the defendant Waters had from that period paid, and the plaintiffs insisted that such sum ought to be taken as the annual value of the tithes during the period for which the account was sought. The defendant Waters relied upon the award and tender in pursuance thereof, as a defence to the plaintiffs' claim.

Mr. Bethell and *Mr. Tripp* appeared in support of the bill, and contended that the plaintiffs were not bound by the award; that it was void for uncertainty, and for not being final, and because it was not made until after the period at which, if money was to be paid to the plaintiffs, it would be payable; and, moreover, that the arbitrators had made the sum to be paid depend upon the fact whether the lands were subject to the full payment of tithes, or only according to a terrier. It was competent for them to have inquired whether the lands were subject to full payment of tithes, or according to the terrier, but they omitted to do so. The question of amount was, there-

Goode & another v. Waters & another.

fore, still open and undecided, and the award could not be considered final, upon which the validity of every award depended.

Mr. Malins and *Mr. Renshaw*, for the defendant *J. Waters*, contended, first, that the award was valid and binding; and, secondly, if not, that the plaintiffs could not, under the statute 53 Geo. 3, c. 127. s. 5, recover the amount of tithes for more than six years previous to the filing of the bill; for it was by that statute enacted, that no suit should be instituted in any Court of equity to recover the value of any tithes, unless such suit should be commenced within six years from the time when the tithes became due. It was laid down in *Eagle on Tithes*, p. 245, that the Court never gave more than six years previous to the institution of the suit. It was also contended that *George Bowen* was improperly made a party to the suit.

[*ROLFE*, V. C. — In your reply, *Mr. Bethell*, you may confine yourself to the question of the statute, and of *Bowen* being a party. It is quite clear that the agreement is nothing. I do not care whether you call it an award, it is quite immaterial; but it is material that that which was referred to the parties to settle should be finally settled; we must look at the case as if the question had arisen in 1836. These gentlemen were *functi officio* for having made a bad award. As to handing it over in order that it might be tried whether that terrier told the truth or not, that is ridiculous; therefore it is quite clear that there is no award in your way. The question is, whether you can recover more than six years from the filing of the bill, and whether you have improperly made *Bowen* a party.]

Mr. Renshaw said, there was an admission that *Bowen* was paid.

Mr. Bethell, in reply, contended that if the defendant did not claim the benefit of the Statute of Limitations by his answer, he could not avail himself of it at the hearing; for if the statute had been set up as a defence, then the plaintiffs might, by amending their bill, have alleged circumstances that would take the case out of its operation. This rule was admitted by all those who had written upon the subject — *vide Lord Redesdale*, (ed. of 1814,) p. 221. As the defendant had not pleaded the statute in bar, the plaintiffs were entitled to an account of all tithes. But the defendant, by contending that the award was valid, and tendering the amount, had admitted the right of the plaintiffs to tithes.

ROLFE, V. C. The principle is, that here the party is going for the tithe; the tithe can but be set out once. The landowner has nothing to do with the parties entitled to it, he has only to set out the tithe. If there is any severance amongst themselves, the party who claims a portion of it must bring all before the Court; therefore I think that *Bowen* is a proper party.

Then, as regards the account, I can only decree the account for six

Gore v. Harris.

years before the filing of the bill, and that is not at all an interference with the principle with reference to the ordinary Statute of Limitations. I have not got the statute before me at present; but from the recollection I have of it, the language is to this effect; that no action shall be brought to charge a person on any simple promise without seal but within six years. A simple promise to pay may be renewed from time to time, and before Lord Tenterden's act, we all know that the least thing was taken very ridiculously as being an acknowledgment that took it out of the statute: it amounted to another promise. I recollect Lord Eldon once said, by way of joke, that the only safe thing for a man to do, if another man came and asked him to pay him what he owed him, was to knock him down. That state of the law has been fortunately remedied by Lord Tenterden's Act: still the same principle applies. The reason why you must at law actually plead, and in equity, by analogy, insist upon the Statute of Limitations, is this: that at law you may say *non assumpsit infra sex annos*. But I very much doubt here if there can be any acknowledgment at all that will alter the rights under this statute of tithes any more than in the statute that limits an ejectment. There you might have acknowledged the party's right the day before, but it did not signify; your right of entry was gone, if the twenty years had elapsed; so it is with regard to the limitation of several other sorts of actions. In the action of assumpsit it was necessary to plead it, because there might be an answer to it; but with regard to tithes, I doubt if that would apply to this statute; and I do not know whether it signifies or not, because, although insisting on the Statute of Limitations, the Court would require the party to point it out. That is not the case with regard to tithes, because the rule of the Court that they would not go beyond six years was a rule drawn by analogy to the statute, but the party never insisted on the statute in those cases; he had no statute to insist upon, and, therefore, the decree can only be for six years before the filing of the bill. It will be a decree in the ordinary way for an account during so much of the period of six years before the filing of the bill as is not covered by the commutation. The costs will follow, as a matter of course.

GORE v. HARRIS.¹

November 12, 1850.

Parties — Creditors' Deeds.

By a deed between A of the first part, B and C, stated to be creditors of A, of the second part, and the creditors of A who should execute the deed of the third part, A assigned his property to B and C, on trust to pay H a sum of money in respect of a lien on some of the property, and to divide the residue among the creditors. B never executed the deed, and his executors filed a bill to set it aside. The bill alleged that B had died

¹ 20 Law J. Rep. (N. S.) Chanc. 74.

Gore v. Harris.

directly after the date of the deed, that C was a bankrupt, that H had not any lien, and had acted improperly in the matter, and that it was the interest of the creditors who had executed the deed that it should be set aside. The only defendants were C, his assignees and H:—

Held, that one or more of the creditors who had executed the deed, were necessary parties to the suit.

THE bill in this case was filed by the executors of Charles Gore. The bill stated that Charles Gore was a creditor of William Saunders; that by a deed, dated the 20th of April, 1841, and expressed to be made between William Saunders of the first part, Charles Gore and John Bowser (stated to be two of the creditors of William Saunders) of the second part, and all the other creditors of William Saunders who should execute the deed of the third part, William Saunders assigned and conveyed all his property to Charles Gore and John Bowser, upon the usual trusts for conversion into money, with a direction that they should first pay Mr. Harris a sum of money in respect of a lien which it was stated he had on some of the property, and to divide the residue ratably among the creditors.

The bill then stated that Charles Gore, who was a creditor, and had been named a trustee, had never assented to this deed, or executed it, and had died the day after the date of it; that John Bowser had become bankrupt; that many of the creditors had executed the deed not in accordance with the directions contained in it; that the sum proposed to be paid to Mr. Harris would very nearly exhaust the produce of the property; and that Harris had no lien or claim on any part of the property of Mr. Saunders. The bill then contained some charges of misconduct on the part of Mr. Harris with reference to the preparation and trusts of the deed.

The bill prayed that the deed might be declared to be void, and that Mr. Harris might pay the costs of the suit.

The plaintiffs had filed their bill at first only against Mr. Bowser and his assignees. Mr. Harris was subsequently made a party by a supplemental bill. The only defendants to the suit were Mr. Bowser, his assignees, and Mr. Harris.

Mr. Harris, by his answer, submitted that all the creditors of Mr. Saunders who had executed the deed, ought to be made parties to the suits.

The cause was set down on this objection for want of parties.

Mr. Russell and *Mr. Speed*, for Mr. Harris, contended that the creditors, or some of them, ought to be made parties to the suit, and cited *Newton v. Earl of Egmont*, 4 Sim. 585; s. c. 5 Sim. 130. *Smart v. Bradstock*, 7 Beav. 500. *Powell v. Wright*, 7 Ibid. 444.

Mr. Swanston and *Mr. Moxon* contended, first, that the creditors were sufficiently represented, as Mr. Bowser, who, though a trustee, was a creditor, and his assignees, and Mr. Harris, who, though not strictly a creditor, was strongly interested in supporting the deed, were parties to the suit; and, secondly, that it was not necessary that any creditors should be parties, or, at least, any others than those men-

Sawyer v. Mills.

tioned, as it was a deed which it was obviously the interest of the creditors to upset, as, by it, it was provided that what, in effect, would be the whole fund, should go to Mr. Harris, who had no legal right to it independently of the deed.

KNIGHT BRUCE, V. C. This is a bill to set aside a deed made for the benefit of creditors. One of the trustees of the deed is dead, and the other has been made a bankrupt. Mr. Harris cannot, I think, be taken into consideration in this respect, as he has not executed the deed as a creditor. I think that the creditors, or some or one of them, ought to be parties or a party to the suit. I do not, however, say how many. I can conceive a case in which one creditor would be better than any other number. The creditors, however, must be substantially represented. Both on principle and authority, I think that, in a case like this, the creditors should be represented. The order will be—Declare that one or more creditor or creditors is or are a necessary party or parties. Reserve the costs.

SAWYER v. MILLS.¹

December 5, 1850.

Administration Suit — Account — Charge as to wilful Default.

A plaintiff in an administration suit upon a reference for taking the accounts cannot include an inquiry as to wilful neglect and default, unless there is a specific charge to that effect in the bill. The general charge of neglect and default is not sufficient.

THIS was a suit by Joseph Sawyer against William Mills, Thomas Mills, and Mary Anne Mills, who were three of the executors and trustees under the will of Mercy Sawyer, and against other persons entitled to the residuary real and personal estate of the testatrix. The bill charged that some part of the personal estate of the testatrix and of the rents and profits of her residuary real estate had been wasted and lost through the wilful neglect or default of the defendants, the trustees and executors of the will, and it prayed that the trusts of the will might be carried into effect under the direction of the Court; that an account might be taken of the personal estate and effects of the testatrix, and the rents and profits of her residuary real estates received by and come into the hands of the said defendants, or any or either of them, or any person or persons by their or any or either of their order, or for their or any or either of their use, or which, but for their wilful neglect or default, might have been so possessed or received; and that the personal estate of the testatrix might be applied in a due course of administration under the direction of the Court.

Mr. Stuart and Mr. Welford appeared for the plaintiff in this case,

¹ 20 Law J. Rep. (n. s.) Chanc. 80.

Sawyer v. Mills.

and asked for the usual reference to the Master for an account in an administration suit.

Mr. Rolt, for the defendants, objected to that part of the decree referring to the wilful neglect or default of the defendant, and contended that, unless wilful neglect and default were specifically charged in the bill, the decree asked for could not be granted. Here there was nothing but the general charge of neglect and default, and it was contrary to the practice in such cases to direct an inquiry including wilful neglect and default.

Mr. Stuart, in reply, contended that the practice was just the reverse, and that in an administration suit the general charge as to wilful neglect and default was sufficient to entitle the plaintiff to the decree asked. In the case of a settled account, it was certainly necessary to prove some specific act of fraud or neglect; but this was not such a case, as there had been no account yet taken. Where a defendant admitted he was executor, and had received assets, the plaintiff had a right to go in before the Master, and make him account for all that had come into his hands. It would otherwise cripple the inquiry, and render it nugatory; and it would, in fact, be necessary to file a new bill for the purpose of charging wilful neglect and default.

ROLFE, V. C. In my opinion, the plaintiff has no right to ask by his bill any thing to which he cannot at the hearing entitle himself. In an ordinary administration suit by a residuary legatee, he might have what is asked if he makes a title for such relief; but as far as my recollection of the practice goes, it is this: that if a party asks an account to which he is entitled, and asks something in addition to that, as charging wilful default, how much he may obtain is in the discretion of the Court. If he does not make such a case by the bill as he asks by his prayer, so much of the bill must be dismissed. What this plaintiff says is, it may turn out that the defendants have wasted and lost the property through their wilful default; and that cannot appear from taking the account of what they have received, but it may put the parties on inquiry. My opinion is, that so much of the bill as charges wilful default must be dismissed, and I only do not say with costs, because it would be more expensive than the thing is worth.

In re Money. — Balguy v. Broadhurst.

*In re MONEY.*¹

December 7, 1850.

Trustee Indemnity Act.

Party entitled to a life interest in a fund paid into Court under the above act allowed to apply for the payment of the dividends to him *in formâ pauperis*.

THIS was the petition of John Money for liberty to present a petition *in formâ pauperis* to obtain a sum of money out of Court, which had been paid *in* under the provisions of the Trustee Indemnity Act. The petition stated that the petitioner was entitled to a life interest in the sum of 166*l.* 10*s.* 9*d.*, standing in the name of the Accountant General, and that the petitioner was not worth 5*l.*, his wearing apparel, and the subject matter of the petition to be presented for the purpose of obtaining payment of the dividends in the said sum when invested, excepted; and it prayed that he might be at liberty to present a petition for the purpose of investing the said sum of 166*l.* 10*s.* 9*d.*, and receiving the dividends, when invested, *in formâ pauperis*; and that counsel and a solicitor might be assigned to him. There was an affidavit by the petitioner as to his poverty, in the usual form.

LORD LANGDALE, M. R., made the order.

BALGUY v. BROADHURST.²

December 2, 1850.

Privileged Communications.

The answer stated that the defendant had documents, but that they had been procured since the institution of this suit, and with a view to the defence, and that the same were, as defendant was advised, confidential communications, and for that reason the defendant refused to set forth any list of or to produce such documents: —

Held insufficient.

THE bill in this case was filed against the trustee of a marriage settlement, to obtain the sum of 8000*l.*, which had been secured by the bond of the husband, who had become bankrupt; the principal question being, whether the husband had, for some years after his marriage, been in prosperous circumstances or insolvent. The bill contained the usual interrogatory as to books and papers, to which the defendant answered, "This defendant saith he hath in his possession or power some of the particulars in the said bill inquired after, belonging or relating to the said settlement, and to the circum-

¹ 15 Jur. 54.

² 14 Jur. 1105.

Balguy v. Broadhurst.

stances of the said defendant Balguy at the time of his marriage and afterwards, or wherein some entries have been made relative thereto, or relating to the circumstances in the said bill mentioned, or some of them; but this defendant saith he denies that from the aforesaid particulars, or any of them, if produced, the truth of the several matters and things in the said bill stated, or of any of them, would appear, save as such matters or things are hereby admitted or appear to be true: and this defendant saith, that some of the aforesaid particulars have been procured by the defendant's solicitors since the institution of this suit, and for the purpose of defendant's defence to this suit, and the same are, as this defendant is advised and insists, confidential communications, and for that reason this defendant refuses to set forth any list or schedule of such last-mentioned particulars, or to produce the same, or to make any discovery relating thereto." To this the plaintiff excepted for insufficiency.

Bethell and *Amphlett*, for the exceptions. The defendant must set out a list, and not make a general assertion of privilege. He contends that these documents have been procured since the institution of the suit; but that by itself is no protection. They cannot relate exclusively to the defendant's case in such a case as this, where the sole question is as to Balguy's insolvency.

Rolt and *G. L. Russell* opposed. There are two ways of protection: first, by setting out a list of documents, and specifying which are protected; and, secondly, by stating generally that they are all privileged, without stating the exact number of papers. We say that the documents are sufficiently described, by stating that they were procured by the solicitor for the purposes of the suit. [*Rolfe*, V. C. — If he had procured documents from the British Museum, would they be protected?] *Holmes v. Baddeley*, 1 Ph. 476. If the documents have reference to any litigation about the matter in question, either past, present, or future, they are protected. We need only state that they were procured for the purpose of the suit. I claim protection solely on the ground that they were procured by me for my own defence. *Curling v. Perring*, 2 My. & K. 380.

Bethell, in reply, was not heard.

ROLFE, V. C. There have been very often great differences in the minds of judges as to the general policy of any rule as to privileged communications. Some judges have thought that there ought to be no such rule, and Jeremy Bentham was of the same opinion. On the other hand, other judges have supported it, and have said that even truth may be purchased too dearly. The rule has now been established and acted on, and whatever may be thought of the rule, I am sure that nothing can be so bad as to have one rule laid down, and the Courts struggling to avoid it; therefore, whenever the matter comes within the rule of privileged communications, I should be always ready to allow it, if it is really a privileged communication,

In re Barber.

made with reference to or in the progress of the suit in question. It would be very dangerous to extend the privilege in a case where the Court is not told what the documents are, and still more so where the party does not even assert his own opinion that they are confidential. Here he only asserts that "he is advised and insists that they are confidential communications." But Mr. Rolt and Mr. Russell contend that the defendant will escape by saying that he has given a list of every thing, except such as have been procured for the defendant's defence; but they may have been so procured, and yet not come within the meaning of privileged communications. The defendant may have the plaintiff's title-deeds; he does not give any statement which will exclude that argument. I do not mean to say he might not frame an answer which would protect him; but this answer is not so framed. — *Exceptions allowed, with costs.*

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In re THE OXFORD AND WORCESTER EXTENSION AND CHESTER JUNCTION RAILWAY COMPANY, and *in re* BARBER.¹

January 16, 1851.

Joint-stock Companies Winding-up Acts — Provisional Committee-man — Contributory.

The managing committee of a company having resolved that each provisional committee-man should be offered 250 shares, A B, one of that body, was by letter offered that number, which he by letter accepted, but only 100 shares were allotted. He did no other act than write to accept the original offer: —

Held, that although the Court assumed he had received a second letter, stating that the remaining 150 shares would be allotted if the committee of management were able to effect it, he was not a contributory.

THE facts of the case were as follows: — The company was started in 1845, and was provisionally registered under the Joint-stock Companies Act. Mr. Barber's name appeared in the printed prospectus of the company as one of the provisional committee. In his evidence before the Master he swore that of this fact he was wholly unaware, until he received the following letter: —

"Oxford and Worcester Extension and Chester Junction Railway.

"5 Basinghall Street, September 10, 1845,

"Sir: I am instructed by the committee of management to inform you, that, as one of the provisional committee, 250 shares, or any less number of shares, will be reserved for you, on your writing me, on or before Wednesday, the 24th instant, whether you desire to have that or any less number apportioned to you.

"I am, sir, yours, obediently,

"Mr. J. Barber."

"H. J. JENKINS, Secretary.

After inquiry, Mr. Barber determined to accept the whole 250 shares, and accordingly he replied as follows: —

In re Barber.

" 10 Gray's Inn Place, September 23, 1845.

" Oxford and Worcester Extension and Chester Junction Railway.

" Sir : I shall be glad to accept the 250 shares in the above company offered to me as one of your provisional committee. •

" I am, sir, your obedient servant,

" JOHN BARBER.

" Mr. H. J. Jenkins, Secretary."

A letter of allotment was sent to him as follows : —

" Oxford and Worcester Extension and Chester Junction Railway.

" No. of allotment, 906. — No. of shares, 100. — Deposit amounting to 210*l*.

" Office, 1 Coleman Street Buildings, Moorgate Street, October 16, 1845.

" Not transferable.

" Sir : The committee of management having, at your request, allotted to you 100 shares of 20*l*. each in this undertaking, I am directed to request that you will pay the deposit of 2*l*. 2*s*. per share thereon, amounting to 210*l*., to the account of the company, to any of the under-mentioned bankers, on or before Thursday, the 23d day of October instant, otherwise this allotment will be cancelled, and the shares disposed of to other applicants. This letter must be produced at the time of payment of the deposit, and the scrip certificates will be delivered in exchange for the bankers' receipt, upon your attending with the same at this office, and executing the parliamentary contract and subscribers' agreement.

" I am, sir, your obedient servant,

" H. J. JENKINS, Secretary."

[At the foot was the list of bankers.]

The letter was addressed to Mr. Barber. The official manager insisted, and Mr. Barber denied, before the Master, that another letter was sent with the letter of allotment, stating that the managing committee would shortly allot the remaining 150 shares. The secretary, who was examined as a witness, failed to prove this. The alleged letter was as follows : —

" Oxford and Worcester Extension and Chester Junction Railway.

" 1 Coleman Street Buildings, Moorgate Street, October 16, 1845.

" Sir : Enclosed I beg to hand you an allotment for 100 shares, and I am instructed to acquaint you, that if, when the committee shall have made their arrangements, they find themselves enabled to comply with their original intention of apportioning you 250 shares, they will be happy to do so.

" I am, sir, yours obediently,

" H. J. JENKINS, Secretary."

Mr. Barber never attended any meeting of the company, nor ever took up shares, or paid the deposit. As he had not the 250 shares allotted, he never accepted the 100. The secretary proved, that on

In re Barber.

the 3d October a minute was made by the managing committee in their book of a resolution to allot to each provisional committee-man 100 shares only, and that the secretary should intimate that if it was found, on "cutting up" the shares, that the remaining 150 could be allotted, they would be happy to do so. Of this resolution Mr. Barber was wholly ignorant.

Roundell Palmer and *Cairns*, for the motion, relied on *Upfill's Case*, reported as *Hutton v. Upfill*, 2 H. L. C. 674; reported also ante, p. 13.

W. P. Wood and *Southgate*, for Mr. Barber.

KNIGHT BRUCE, V. C. Unless the House of Lords, judicially, or the Legislature, shall depart from *Upfill's Case*, or declare it to be not according to the law, other courts of justice must, in cases not distinguishable from it, conform themselves to that decision as an authority, and a sufficient exposition of the law of the country. I think the present case, however, substantially distinguishable from *Upfill's Case*. The first question is, whether the letters of the 10th and the 23d September form between themselves a perfect and concluded contract. That must be decided by the language of the letters themselves, aided only by such extrinsic evidence as in such cases is always admissible, and with reference to the position in which the parties to the alleged contract stood at the time, and with reference to the subject matter. This qualification of the rule admitting extrinsic evidence, upon a question of construing a written instrument, is one of universal admission. The evidence before me beyond these letters cannot be received for the purpose of construing them, except within those limits—limits declared by authority, and now universally understood. Considering these letters by themselves, and only with such addition as the law gives, I am of opinion that the true construction of the letters is not that they amounted to an actual allotment and an actual acceptance, but an offer, a proposal to allot at some future time, when allotting should take place, (if ever that time should come,) a certain number of shares, and an acceptance of that offer on the part of the person to whom the offer was made; and therefore, if, according to the terms of the two letters, 250 shares had been allotted, I am not prepared to say that Mr. Barber would not have been bound. I am not prepared to say that he would have been entitled to recede from that plain acceptance of, what I think, a plain offer. In the mean time, however, I do not consider him to have been in the position of a shareholder, or to have been in the position of what is called an allottee; he is in this position, that he had been offered, and had accepted, an option to be placed in that position at some possible future time. These 250 shares were never, in point of fact, allotted; but in the following month of October, the acceptance having been on the 23d September, within less than a month, comes a letter to him, which, taken by itself, seems to disregard every thing that had previously occurred between the parties, being in these terms:—

In re Barber.

"Office, Coleman Street Buildings, Moorgate Street.

"Not transferable.

"Sir: The committee of management having, at your request, allotted to you 100 shares of 20*l.* each in this undertaking" —

It sets out with an inaccurate statement, and then it goes on with this request:—

"I am directed to request that you will pay the deposit of 2*l.* 2*s.* per share, amounting to 210*l.*, to the account of the company, to any of the under-mentioned bankers, on or before Thursday, the 23d day of October instant; otherwise this allotment will be cancelled, and the shares disposed of to other applicants."

I am of opinion, that, if this was not accompanied by any other communication, Mr. Barber was entitled to disregard it, and was entitled to consider it as sent to him by mere mistake. He had never consented, still less had he ever requested, to take "100" shares; 250 was the number of shares which, having been offered to him, he had agreed, as I have said, at some future possible time, to accept. The theory, however, of those opposed to Mr. Barber upon this question is, that the letter I have just read was accompanied by another letter of the same date. Mr. Barber says it is not proved that that letter was ever received by him; but I assume, for the purpose of argument, that it is proved against him that he did receive it. It is in these terms:—

"Sir: Enclosed I beg to hand you an allotment for 100 shares, and I am instructed to acquaint you, that if, when the committee shall have completed their arrangements, they find themselves enabled to comply with their original intention of apportioning you 250 shares, they will be happy to do so."

But that was not the contract—if contract there was—into which Mr. Barber had entered. He had never said he would take 250 shares by instalments; he had not said he would take 100 shares in a state of uncertainty whether that number would be added to or not. He had said he would take 250. Still, however, if he had accepted this proposed variation—for so I think it—of the former proposal or contract, whichever it was, he would probably have been bound by it. He does not accept it, he does not answer it; and I think he was not bound to answer it; and his silence on such a communication could not have reasonably been construed, and ought not to have been taken, as tantamount to an assent or acceptance. He had a right, in my opinion, to be silent, and he was so. Soon after this the bubble burst. Nothing having occurred in the mean time, I am of opinion that the position in which they stood at the time when this scheme vanished into air was, that they promised, at a time which never arrived, and which was prevented from arriving, that he should be placed in a particular situation. I am of opinion that the conclusion of the Master cannot be disturbed. The costs must come out of the estate.

 Sichel's Case.

SICHEL'S CASE.¹

January 14 and 15, 1851.

Contributory.

A provisional committee-man who has accepted shares is a contributory.

THIS was an application to reverse the decision of the Master, and strike the name of Silvester Emil Sichel from the list of contributories to the Direct Birmingham, Oxford, Reading, and Brighton Railway Company. The following correspondence formed the evidence relied on by the official manager:—

“Direct Oxford, Reading, and Brighton Railway Company.

“46 Moorgate Street, October 10, 1845.

“Sir: I am requested to inform you that the committee of management has apportioned 100 shares in this company to each member of the provisional committee; you please inform me, on or before Wednesday morning, whether you will take that or any less number. Should you not reply by that time, the committee will consider you decline taking any.

“I remain, very respectfully,

“Your obedient servant,

“J. B. RAYNER, Secretary.”

“Manchester, October 14, 1845.

“Sir: I feel obliged for your circular of the 10th instant; but, upon looking into the report of the committee, I find no remark made whether the surveyors will positively be ready for the next session, and you will perhaps drop me a few lines on the subject; for should it be so, I shall be happy to accept the 100 shares allotted to me.

“I remain, sir, yours,

“S. E. SICHEL.”

“Direct Birmingham, Oxford, Reading, and Brighton Railway.

“16 Moorgate Street, October 15, 1845.

“Sir: There is not any doubt of our plans, &c., being ready in the most perfect and satisfactory manner for the coming session of Parliament.

“I remain, very respectfully,

“Your obedient servant,

“J. B. RAYNER, Secretary.

“S. E. Sichel, Esq., Manchester.”

“Manchester October 17, 1845.

“Sir: Please to put in my name fifty shares of the 100 reserved for me in the Direct Birmingham, Oxford, Reading, and Brighton Railway. I feel obliged to you for the information contained in your favor of the 15th instant, and beg to subscribe myself,

“Very respectfully,

“J. B. Rayner, Esq.

“S. E. SICHEL.”

 Sichel's Case.

" Letter of allotment. Not transferable.

" Direct Birmingham, Oxford, Reading, and Brighton Railway.

" Capital, 2,000,000*l.*, in 80,000 shares of 25*l.* each.

" Deposit, 2*l.* 12*s.* 6*d.*

" 46 Moorgate Street, October 18, 1845.

" Sir: The committee of management have allotted to you fifty shares in this undertaking, and I am directed to request you will pay the deposit of 2*l.* 12*s.* 6*d.* per share, amounting to 131*l.* 5*s.*, into one of the under-mentioned banks, on or before Friday, the 24th day of October, 1845, or this allotment will be null and void. This letter, with the bankers' receipt appended thereto, will be exchanged for scrip upon your presenting it at the offices of the company, and executing the parliamentary contract and subscribers' agreement, which will lie at the above offices on and after the 24th October, and due notice will be given when the deeds will be sent into the country.

" I am, sir, your obedient servant,

" J. B. RAYNER, Secretary.

" To Mr. S. E. Sichel.

" [Bankers, &c.] "

It did not appear that any deposit had ever been paid by Mr. Sichel.

Rolt and Daniel, for Mr. Sichel. In order to bring this case within the rule of *Upfill's Case*, (ante, p. 13,) there must be clear evidence that Mr. Sichel was a provisional committee-man, and that he accepted shares. Now, here there is very imperfect evidence that he was a provisional committee-man, and we contend that he only accepted the shares provisionally, on the company being able to go to Parliament, and had, therefore, till the 30th November to decide in. The plans were never deposited, and the condition was, therefore, never fulfilled.

Roxburgh, in support of the Master's decision. This case is exactly the same as *Upfill's Case*. That decision makes Mr. Sichel liable to contribute in proportion to the fifty shares he had subscribed for. Every shareholder is liable to contribute, not only for the expenses he actually authorized, but for the expenses incurred by the committee who have the management. [*Lord Cranworth*, V. C.— Suppose in a company the shares subscribed for amount to 1000*l.*, and the liabilities of the company to 10,000*l.*, who is to pay the remainder of the 10,000*l.*? Surely, those who ordered the expenses to be incurred.] It will be paid by the committee-men, in proportion to the shares they have taken. [*Lord Cranworth*, V. C.— Suppose expenses had been incurred before Mr. Upfill had become a member, could he be called upon to pay for them?] He accepted the shares with their liabilities. It having been found how much had been incurred before he joined, and how much afterwards, the liabilities would be apportioned. In *Carmichael's Case*, (ante, p. 66,) there was no positive acceptance of shares; here there is.

Rolt, in reply.

LORD CRANWORTH, V. C. I took these papers home for the purpose of comparing what the letters and documents actually were with reference to *Upfill's Case*, because, though I stated that I do not know that I quite understand that case, yet it is binding and obligatory on me. It was the decision of the House of Lords, and was much considered, though there were not many peers present. I, however, have nothing to do with that; and I know that Lord Brougham gave much attention to the case. The principle on which it was decided appears in many passages of the judgment, and particularly in the last part. He there says, "I wish it to be most distinctly understood, and it is of the greatest importance, that it is upon the two facts taken together that the judgment proceeds: one of them" — that is, the being a provisional committee-man — "is found at law not to be sufficient without the second; and it is a question whether the second is sufficient without the first." I observe that the case of *Ashpitel v. Sercombe*, 19 Law J. Rep. (N. S.) Exch. 82, in the Court of Exchequer, was not cited before the House of Lords on the argument of *Hutton v. Upfill*; and if it had been so, no doubt Lord Brougham would not have said that it had never been decided at law, whether the two circumstances, being united, made any difference. It is clear that that was held to be nothing, in *Ashpitel v. Sercombe* at least. However, what the House proceeded on was this: that where a party, being a provisional committee-man, is informed that, in his character of provisional committee-man, he is entitled to have a certain number of shares allotted to him, and, acting upon that information, he accepts shares, these two facts, taken together, constitute him a contributory. That being so, it is a very intelligible doctrine, and I have only to look whether that state of circumstances has occurred here. Now, this case happens to be in the very same railway company as *Upfill's Case*. The evidence in *Upfill's Case* was, first of all, this letter of information; [his Lordship read the letter;] that was also the letter in the present case, being a circular letter, and was from the same person as secretary. Now, in answer to that in *Upfill's Case*, Upfill wrote, "I accept, &c., James Upfill, P. C.," — "P. C." meaning provisional committee-man. In the present case, as in that, Mr. Sichel was a provisional committee-man; and on receiving the letter, he writes to inquire whether the plans will be ready. [His Lordship read the letter.] The secretary answers, that there is no doubt of the plans being ready; in answer to which, on the 17th October, Sichel writes, "Sir: Please to put in my name fifty shares of the hundred reserved for me." Now, the only question is, whether that correspondence did amount to the same thing as in *Upfill's Case*; and I confess I think it is clear that it does. Mr. Rolt made an attempt to distinguish this case as an acceptance of shares provisional on the company being ready, and obtaining the act of Parliament: but in answer to Mr. Sichel's question, the secretary writes something which is satisfactory to him, whether right or not, and he waives his objection, and writes an answer, as in *Upfill's Case*, and says he

Best's Case.

accepts the shares. It is ridiculous to say that there is a difference because in one case a hundred shares are taken, and in the other fifty. In *Upfill's Case*, it was also argued, as in this, that this was only an apportionment of shares, and did not amount to an allotment; but Lord Brougham scouts that idea, and says, allotment is the same as apportionment: so does this man; he says the committee has made an apportionment of one hundred shares to every committee-man who wishes to have them. "How many do you choose to have?" and Mr. Sichel answers, "I choose to have fifty." There is hardly a single word of difference between this and *Upfill's Case*; and that case must govern it, and Mr. Sichel's name remain on the list of contributories. — *Motion refused, with costs.*

BEST'S CASE.¹

January 11 and 15, 1851.

Winding-up Act—Second Summons.

When the Master has specially excluded the name of any person from the list of contributories in respect of any shares, that person cannot again be summoned before the Master in respect of the same shares.

Upfill's Case, ante, p. 13, observed on.

AN order having been made for winding up the Direct Birmingham, Oxford, Reading, and Brighton Railway Company, the name of Benjamin Best was, on the 3d June, 1850, placed by Master Brougham on the list of contributories, but on motion before Knight Bruce, V. C., was, on the 23d July, ordered to be struck out. On the 10th December, (after the decision in *Upfill's Case*, ante, p. 13,) an application was made to the Master to replace Mr. Best's name, on the ground of further evidence; and after hearing both sides, the Master was of opinion, that, on the authority of *Upfill's Case*, Mr. Best's name must be placed on the list.

Rolt and Prior now moved to have his name struck off. In this case the Master had no jurisdiction, a former application having been made to him, and Mr. Best's name having been since struck off. By the Winding-up Act, 11 & 12 Vict. c. 45, s. 81, it is enacted, "that it shall be lawful for any person whose name shall stand upon the list of contributories, to summon any other person whose name shall not be upon such list, and *who shall not have been previously specially excluded therefrom*, to appear before the Master, at a day and time to be therein specified, to show cause why his name should not be included in or specially excluded from the list." Now, here Mr. Best has been specially excluded, and the Master had, therefore, no power whatever to proceed. *Ex parte Hollingsworth*, 14 Jur. 232.

¹ 15 Jur. 54.

Best's Case.

Bethell and Roxburgh, for the official manager. By the Amendment Act, 12 & 13 Vict. c. 108, s. 17, it is enacted, that it shall be lawful for the Master, from time to time, to reconsider and review any order or proceeding which may have been made by, or may have taken place before him, under the said act, upon such terms and in such manner as he thinks fit; and by sect. 27, the power by the said act given to contributories to summon any other person to show cause why his name should not be included in, or specially excluded from the list, and the power of the Master to declare such person included in or excluded from the list, shall and may be exercised from time to time, so long as the list has not been wholly settled, although the person so to be summoned have been already included or specially excluded, (as the case may be,) as respects any other share or interest in the company than the share or interest in respect of which he is proposed to be included in or specially excluded from the list. Now, this proceeding may be considered as a review under the 17th section, and by the 27th the Master is expressly authorized to exercise his powers till the list is finally settled.

January 15, 1851. LORD CRANWORTH, V. C. This case is exactly the same as *Sichel's Case*, except that I do not think the Master had any jurisdiction; but that is only a matter of form. In my opinion, upon the construction of the act of Parliament, the Master could not do what he has done. By sect. 81 of the Winding-up Act—[his Lordship read the section;] that is to say, if the name has not been excluded, the party may be summoned. Then comes the Amendment Act, s. 17. [His Lordship read the section.] It is clear, when the former act of Parliament has said in terms that the party who had been specially excluded should not be summoned again, that this section did not authorize the Master to proceed. Then there is the 27th section. [His Lordship read the section.] It may be beneficial to the party to have his name inserted as contributory, as he may have something to receive. On the true construction of the former act, if Best's name is at first excluded, under no circumstances could he be summoned to be included or excluded, contrary to what was formerly decided. But the act contemplates that there may be another set of shares, with respect to which he may be liable. Suppose he has other shares, he may, under this act of Parliament, be dealt with as if he had not been dealt with at all. I think, therefore, that on that ground he must be dealt with, for I think the Master had no authority at all.—*Remove the name of Mr. Best; costs of all parties out of the estate.*

His Lordship subsequently observed, It is a great misfortune, that, from the hurried way in which *Upfill's Case* was necessarily argued at the end of the session, the result was, that it was argued without all the assistance that might have been had; and that all the cases before the Exchequer, and the Exchequer Chamber in error, were not brought before the House.¹

¹ As *Upfill's Case* has been the subject of so much comment, the reporter publishes the following observations, which appear, from the short-hand writer's note of the

In re Fulham.

In re JOSEPH THOMAS FULHAM,¹ a Lunatic, and *in re* THE TRUSTEE ACT, 1850.

November 8, 1850.

The Trustee Act, 1850 — Vesting Order — Costs of Proceedings under former Trustee Act.

IN this case, an order of reference, dated the 8th March, 1850, had been made to the Master to inquire whether the lunatic was a trustee of certain lands within the meaning of the stat. 1 Will. 4, c. 60, and to approve of proper persons to be appointed trustees in the place of the lunatic. The Master, by his report, dated the 31st July, 1850, found that the lunatic was a trustee of the lands in question within the meaning of the above statute, and he approved of two persons to be appointed trustees in his place, and he approved of another person to convey, assign, or transfer the real and personal trust estate to the proposed new trustees. The petition now prayed that that report might be absolutely confirmed, and that it might be ordered that the freehold and leasehold hereditaments and premises be vested in the new trustees, their heirs, executors, administrators, and assigns, upon the then subsisting trusts; and that it might be referred to the Master to tax the petitioners their costs and expenses of obtaining and prosecuting the order of reference of the 8th March, 1850, and of obtaining the said report, and incident thereto, and the costs relating to the present application; and that the new trustees might, out of the first moneys which should come to their hands in the execution of the trusts, pay the amount of such costs and expenses.

Bromehead, for the petition, now asked the Court to make a direct vesting order under the 3d section of the 13 & 14 Vict. c. 60,² to save the expense of a conveyance to the new trustees; and that the costs might be paid as prayed.

judgment in that case, to have been made by Lord Brougham after the judgment had been delivered: "I wish it to be most distinctly understood, and it is of the greatest importance, that it is the two facts taken together: one of them is found at law not to be sufficient without the second, and the question is, whether the second is sufficient without the first. However, the decision of the House goes upon both. Concerning a provisional committee-man's acceptance of shares, Lord Lyndhurst has unfortunately left town, so that I cannot state how he would view this matter; but I shall be able to do so hereafter. I ought to mention, that I communicated with my noble and learned friend, Lord Cottenham, upon this subject, and he takes exactly the same view that I do; but it will probably have your Lordships' authority upon this account, that Lord Cottenham has a very strong leaning on the subject of liability, and leans much more in favor of liability than the other judges have been disposed to do, though he clearly negatives the doctrine ventilated at the bar, that there was an equitable liability, and not a legal liability, and that the legal liability is no measure of the total liability; he totally negatives that."

¹ 15 Jur. 69.

² That section enacts, "that when any lunatic, or person of unsound mind, shall be seized or possessed of any lands upon any trust, or by way of mortgage, it shall be lawful for the Lord Chancellor, &c., to make an order that such lands be vested in

In re Ramshay.

The LORD CHANCELLOR was of opinion that it was competent for him to make the vesting order under the 3d section of the late act, notwithstanding that the former petition, order, and other proceedings had been under the former Trustee Act, 1 Will. 4, c. 60; and so made the order; but his Lordship was of opinion that he had no jurisdiction, under the 51st section of the late act,¹ to order the payment of any of the costs incurred in the proceedings under the former act of Parliament; and confined the order as to costs to the present petition, and the proceedings under the late act.

In re RAMSHAY,² a Lunatic, and *in re* THE TRUSTEE ACT, 1850.

January 30, 1851.

This Court will not take upon itself to inquire into the fact whether a lunatic is a trustee within the meaning of the Trustee Act, 1850; there must be a reference to the Master to make that inquiry, according to the former practice.

THIS was a petition praying for the appointment of new trustees in the place of the lunatic.

Karslake, in support of the petition, came prepared with evidence to show to the Court that the lunatic was a trustee within the meaning of the late Trustee Act, 13 & 14 Vict. c. 60, and the other evidence which would have been used before the Master upon an inquiry under the act 1 Will. 4, c. 60.

The LORD CHANCELLOR stopped him *in limine*, stating that the time of the Court could not be taken up upon such an inquiry, and that there must be the usual inquiry before the Master.

such person or persons, in such manner and for such estate, as he shall direct; and the order shall have the same effect as if the trustee or mortgagee had been sane, and had duly executed a conveyance or assignment of the lands in the same manner for the same estate."

¹ That section enacts, "that the Lord Chancellor, &c., and the Court of Chancery, may order the costs and expenses of and relating to the petitions, orders, directions, conveyances, assignments, and transfers to be made in pursuance of this act, or any of them, to be paid and raised out of or from the lands or personal estate, or the rents or produce thereof, in respect of which the same respectively shall be made, or in such manner as the said Lord Chancellor or Court shall think proper."

It is to be observed, that the petition was only intituled in the late Trustee Act, not in the former.

² 15 Jur. 69.

Cooper v. Dodd.

COOPER v. DODD.¹

November 30, 1850.

2 & 3 Will. 4, c. 93.

Sequestration against a Party declared contumacious by the Ecclesiastical Court.

THE Ecclesiastical Court having by its order pronounced a party in this cause contumacious, and in contempt for non-payment of a sum of money, a copy of such order, under the seal of the Ecclesiastical Court, was, within ten days, made out and duly certified, but such certificate was not confined to the decree merely, but contained a recital of the circumstances under which the order was made; and this certificate was not lodged with the secretary of the Lord Chancellor until the eleventh day after the Ecclesiastical Court pronounced its order. An order for sequestration was directed, under the 2d section of stat. 2 & 3 Will. 4, c. 93;² but upon drawing up the order, the Registrar took two objections: First, that the certificate of the order of the Ecclesiastical Court was bad in form, from its having introduced a statement of the circumstances of the case. Secondly, that the certificate ought to have been lodged with the Lord Chancellor's secretary within ten days after the party had been pronounced contumacious.

Beales now read the 2d section of the above statute, and contended that the recital in the certificate, of the circumstances of the case which led to the order, was mere surplusage; and further, that the limit of ten days, mentioned in the statute, only had reference to the act to be done by the judge of the Ecclesiastical Court; and that it was not the intention of the act of Parliament that the party obtaining the order should be obliged to present it to the Lord Chancellor within the ten days.

The LORD CHANCELLOR agreed with both contentions, and desired the order to be drawn up.

¹ 15 Jur. 69.

² "An Act for enforcing the Process upon Contempts in the Courts Ecclesiastical of England and Ireland." The 2d section, after giving the judges of the ecclesiastical courts power to pronounce parties contumacious, and in contempt for non-payment of money ordered by the Court to be paid by them, proceeded: "And within ten days after such person or persons shall have been so pronounced contumacious, and in contempt, to cause a copy of such order or decree, under the seal of the Court wherein the same shall have been made, or under the hand or hands of such judge or judges, or one of them, to be exemplified, and certified to the Lord Chancellor, &c., whenever the person or persons who shall have been so pronounced contumacious shall be domiciled or residing, or shall be seized or possessed of or entitled to any real or personal estate, goods, chattels, or effects, situate, lying, or being in England; and the said Lord Chancellor, &c., shall forthwith cause such copy of such order or decree, when it shall be presented to them respectively, so exemplified, to be enrolled in the rolls of the High Court of Chancery in England, and shall thereupon cause process of sequestration to issue against the real and personal estate, goods, chattels, and effects, in England, of the party or parties against whom such order or decree shall have been made," &c.

The Sutton Harbor Company v. Hitchens.

THE SUTTON HARBOR COMPANY v. HITCHENS.¹

January 19, 1851.

Lands Clauses Consolidation Act, 1845.

A party having, under the 68th section of the above act, claimed compensation for injury alleged to be done to his property by the works of a company, who disputed the right to compensation, an injunction was granted, on the application of the company, to restrain the claimant from proceeding to ascertain the amount of compensation until he had established his right at law.

THIS was a motion to restrain the defendant from proceeding, under the 68th section of the Lands Clauses Consolidation Act, 1845, to have the amount of compensation claimed by him, for injury alleged to be done to his property by the plaintiffs, ascertained and settled by arbitration, in the manner prescribed by the above section. The defendant was a coal merchant and ship owner, having wharves and warehouses adjoining Sutton Harbor, at Plymouth; and the plaintiffs, under the powers given to them by act of Parliament, were taking measures to improve the harbor. They did not take any part of the defendant's property, but it was alleged by the defendant that the plaintiffs had constructed a coffer-dam, which injuriously affected him in the enjoyment and use of his wharves, by preventing vessels from coming so close to them as was desirable; and he gave notice to the company that he claimed 65*l.* for compensation, and desiring to have the amount to which he was entitled settled by arbitration. The plaintiffs denied the right of the defendant to any compensation at all, and they filed their bill in this suit to restrain him from proceeding under the 68th section of the above act. This section enacts, that "if any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for, or injuriously affected by, the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special act, or any act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of 50*l.*, such party may have the same settled either by arbitration or by the verdict of a jury, as he shall think fit; and if such party desire to have the same settled by arbitration, it shall be lawful for him to give notice in writing to the promoters of the undertaking of such his desire, stating in such notice the nature of the interest in such lands in respect of which he claims compensation, and the amount of the compensation so claimed therein; and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and shall enter into a written agreement for that purpose within twenty-one days after the receipt of any such notice from any party so entitled, the same shall be settled by arbitration in manner therein provided; or if the party so entitled as aforesaid desire to have such question of compensation settled by jury, it shall be lawful for him to give notice in writing of such his desire to the pro-

¹ 15 Jur. 70.

Foster v. Handley.

motors of the undertaking, stating such particulars as aforesaid; and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and enter into a written agreement for that purpose, they shall, within twenty-one days after the receipt of such notice, issue their warrant to the sheriff to summon a jury for settling the same in the manner herein provided, and in default thereof they shall be liable to pay to the party so entitled as aforesaid the amount of compensation so claimed, and the same may be recovered by him, with costs, by action in any of the superior courts." The plaintiffs now moved for an injunction.

R. Palmer and *C. Hall* appeared in support of the motion. They cited *The London and North-western Railway Company v. Smith*, 1 Mac. & G. 216; s. c. 19 Law J. Rep. (N. S.) Chanc. 193, in which Lord Cottenham, C., in a case where the right to compensation was disputed by the company, granted an injunction to restrain the party claiming compensation from enforcing the provisions of the 68th section until he had established his right by action at law.

Turner and *Glasse* opposed the motion.

LORD LANGDALE, M. R., granted an injunction on the authority of the above case, in similar terms to those adopted by Lord Cottenham.

FOSTER v. HANDLEY.¹

January 18 and 22, 1851.

Legal Assets.

In the administration of real estate not devised for the payment of debts, an equity of redemption is now legal assets.

THIS was a creditor's suit, under which the equity of redemption in fee in an estate subject to a mortgage in fee had been sold, and, after payment of the mortgage money, it was proposed in the minutes, as prepared by the plaintiff, that the residue should be paid into Court, and held as legal assets, under the 3 & 4 Will. 4, c. 104.

Waley, for the plaintiff.

Smale, for the executors and trustees of the equity of redemption, submitted, whether, under that act, the equity of redemption was not equitable assets. See 2 Spence, 643; Coote, Mort., 213; and *Plunkett v. Penson*, 2 Atk. 294.

Webster v. The South-eastern Railway Company.

January 22, 1851. LORD CRANWORTH, V. C. I would much rather that this case should not be decided without some adverse parties to litigate it, as it has not been argued adversely. I confess I think it contrary to what I suspect was the intention of the framers of the act 3 & 4 Will. 4, c. 104; but I think it clear that a specialty creditor must be paid in full. We have nothing to guide us as to the meaning of the act of Parliament, except the language; it is in the shortest form: "When any person shall die seized of or entitled to any estate or interest in lands, tenements, or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customaryhold, or copyhold, which he shall not by his last will have charged with, or devised subject to, the payment of his debts, the same shall be assets, to be administered in courts of equity, for the payment of the just debts of such person, as well debts due on simple contract as on specialty." Then comes this proviso: "Provided always, that in the administration of assets by courts of equity, under and by virtue of this act, all creditors in specialty, in which the heirs are bound, shall be paid the full amount of the debts due to them before any of the creditors, by simple contract, or by specialty in which the heirs are not bound, shall be paid any part of their demands;" that is to say, in every suit in which freeholds and copyholds, not having been devised for the payment of debts, are to be administered, all specialty creditors shall be paid in full before the simple contract creditors. There is no doubt about the meaning of it, though I may have strong suspicions that what the framers of the act meant was merely that nothing in it should interfere with the legal priorities of specialty creditors. Then, as a specialty creditor would have no claim upon copyhold estates, it would be equitable assets only; but they have not said that, but have said, that in the administration of assets, by virtue of this act, the specialty creditor shall be paid in full before the simple contract creditors; there is no room for any doubt about it. This was not assets at all, legal or equitable, before the act passed; and the act says it shall be legal assets in a particular mode. I tried to spell the act to mean merely that specialty creditors should not have their rights prejudiced; but I am unable to do so. — *Decree according to minutes.*

WEBSTER v. THE SOUTH-EASTERN RAILWAY COMPANY.¹

January 21 and 25, 1851.

Injunction — Railway Company.

A railway company paid for and took a conveyance of a piece of land from D. W. afterwards claimed the land, and moved to restrain the company from taking it, their compulsory powers having expired. The evidence of title was conflicting between D. and W.: — *Held*, that W. had his remedy by ejectment; and injunction refused.

 Webster v. The South-eastern Railway Company.

THIS was a motion to restrain the South-eastern Railway Company from entering on a certain piece of land. The statements in the bill are fully referred to in the judgment, and also so much of the affidavits as is necessary.

Malins and *Schomberg*, for the motion, contended that Sir G. Webster was owner in fee of the lands in question, and that the compulsory powers of the act had expired, and that the company had no right to proceed under them. *Brocklebank v. The Whitehaven Junction Railway Company*, 11 Jur. 663; on appeal, 15 Sim. 632. *Kinnersley v. The North Staffordshire Railway Company*, V. C. E., reversed by L. C., not reported. *Baker v. The North Staffordshire Railway Company*, not reported: the decision was there appealed from, but, the company having obtained fresh powers under a new act, the appeal was not prosecuted. *Shaw v. The London and North-western Railway Company*, M. T., 1850, V. C. K. B., unreported, in which a case was sent to law.

Bethell, *R. Palmer*, and *Baily*, for the company, opposed. This is a case of disputed title, and there is no satisfactory proof of ownership by the plaintiff. The company is now in possession, and claims under another person. The Court may put the question of ownership in a course of trial, and should not interfere till the right of the plaintiff is established. It is a mere case of oppression on the company, and no ground whatever for equitable relief has been shown. *Davenport v. Davenport*, 7 Hare, 217; s. c. 18 Law J. Rep. (N. S.) Chanc. 163. *The London and North-western Railway Company v. Smith*, 1 Mac. & G. 216; s. c. 19 Law J. Rep. (N. S.) Chanc. 193.

Malins, in reply, cited *Barker v. The North Staffordshire Railway Company*, 2 De G. & S. 55; 12 Jur. 324, 589.

January 25, 1851. LORD CRANWORTH, V. C. This was a motion to restrain the defendants, the South-eastern Railway Company, from keeping possession of, or entering or continuing in or upon, a certain piece or parcel of ground, and also from digging, using, interfering, or in any manner meddling with the same, and from committing any waste or spoil thereon, or on any part thereof. The bill was filed by Sir Godfrey Webster, and was supported by his affidavit, which states the title in the same way, in these words: That in July, 1836, the plaintiff became seized or otherwise well entitled to an estate of freehold for his life, amongst other hereditaments, to a piece or parcel of land containing about a quarter of an acre, and that up to the present time the plaintiff has been and continues seized of, or otherwise entitled to, the said piece or parcel of land described as aforesaid. The bill goes on to state, that in 1836 the defendants obtained an act of Parliament, and in 1846 they obtained a further act, empowering them "to make a railway from Tunbridge Wells to join the Rye and Ashford Extension of the Brighton, Lewes, and Hastings Railway, near Hastings;" and the compulsory powers for taking land were to last three years. Then the bill goes on to allege the absence of the plain-

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tiff, and that in the year 1849 the company served notices at Battle Abbey that they intended to take certain pieces of land, not including the piece of land in question, and that, the plaintiff being abroad, the company caused the pieces of land to be valued, and that the sum fixed was far below the value: that the plaintiff objected, but nevertheless the company caused the amount of the valuation to be paid into the bank. The plaintiff proposed that the company should give him the sum of 2500*l.* additional; but the company refused, and the plaintiff, under the provisions of the act of Parliament, named an arbitrator, and required the company to do the same. The bill then goes on to state, and the affidavit follows it, that the piece of land now in question formed no part of the lands and hereditaments mentioned in the notices left at Battle Abbey, and does not form part of the lands and hereditaments comprised in the valuation before mentioned: that on the 13th December, 1850, the South-eastern Railway Company, without the license or consent or knowledge of the plaintiff, or of any person on his behalf, entered upon, and wrongfully took possession of, the said piece or parcel of land, and have by their workmen and laborers commenced digging and otherwise using the said piece or parcel of land, or part thereof, for the purpose of the said railway, and have felled or pulled down one or more tree or trees thereon, and have not made or offered to make to the plaintiff any compensation for the same: that the plaintiff was absent from Battle Abbey on the said 13th December, and was at Portsea in attendance, by authority, on certain distinguished foreigners now visiting England, and the plaintiff was not informed of the said South-eastern Railway Company having so taken possession of the said piece of land until Sunday, the 15th, or Monday, the 16th December. Then the injunction is prayed, and no other relief is asked for. I am of opinion that no case whatever has been made for any part of the relief, and for this reason: the company here claims nothing whatever from the plaintiff under the powers of the act — nothing whatever, so far as this piece of land is concerned, for they claim adversely. In the plan this piece of land was claimed as being the land of the Dean of Battle and his lessees; and the company in their case say, that finding the parties in possession, and believing it to be the land of the Dean of Battle and his lessees, they served notices accordingly, and have settled with them and obtained a conveyance from them, and therefore claim under other persons. I have read through the cases, so far as I have been able, and find no authority for supposing that this Court will interfere against a railway company more than against other persons. The cases in which the Court will interfere are cases in which the company have proceeded under the powers of their act, as in the case of *Brocklebank v. The Whitehaven Junction Railway Company*, 11 Jur. 663: there, if the Vice Chancellor was right in thinking that the fact of the verdict having been returned after the powers had expired, made it a nullity, he was quite right in saying that the company, not having fulfilled the directions of the act, should not be allowed to proceed under a pretended authority. The Lord Chancellor, on appeal, 15 Sim. 632, doubted whether that was the

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true construction of the act; if he had thought it was, he would, no doubt, have proceeded in the same manner. Several other cases were cited proceeding on the same principle. In *Barker v. The South-eastern Railway Company*, 2 De G. & S. 55; 12 Jur. 324, 589, the company had given notice for taking ten pieces of land, and in the progress of the railway they thought they only wanted eight, and proceeded to take them; but the Vice Chancellor said, "You cannot come in piecemeal in this way; you must take the ten." And the Lord Chancellor was of the same opinion, and proceeded on the same ground; that is to say, that where the company is proceeding under the act to take away a person's property, that person has a right to say, "You shall not stir till you have a valid act." But how does that apply to a case like this, where the railway company claim adversely to the plaintiff? They claim other lands of his, it is true, and about them litigation is going on; but this piece of land forms no part of the lands in litigation between them. This does not come within the principle of those cases. But in granting an injunction in cases like this, I should, instead of preventing irreparable mischief, be doing, perhaps, irreparable mischief, if, after the company have given their notices, a third person, at the last moment, is allowed to come and state, in a very few words, that he is entitled to call on the Court to interfere, *brevi manu*, to stop the railway. We should very likely be doing great injury to the railway company by compelling them to come to terms with the claimant. There is no suggestion in the bill that this land is in the smallest degree important to the plaintiff—nothing to show that an ejectment will not give him every relief to which he is entitled. This renders it quite unnecessary to discuss the question, which is very difficult and improper to be discussed on a motion of this sort; that is to say, to whom, on the balance of testimony, this land belongs. All I can say is, that the plaintiff has stated facts which might warrant a jury in saying that Sir Godfrey Webster is owner. But he is met with evidence on the part of the company, which, upon a trial, would justify a jury in saying that he is not entitled. It is a case of very minute circumstances, leaving it in doubt where the justice of the case rests. [His Lordship then read and commented on the affidavits of title filed by the two parties.] I have stated this just to show that the evidence was at least equipollent on the one side and on the other. My opinion is, that where a mere question is in dispute, a bill filed on that footing, and no more, entitles the party to no relief. If Sir Godfrey Webster is entitled to this relief, suppose the company compound with him, what is to prevent, next day, any third person from filing a bill, and showing a plausible reason, and saying that he is entitled? The company will then be stopped again. My opinion is, that this is a mere case of adverse title claimed by Sir Godfrey Webster, with very slight evidence of that adverse title, and without any allegation that an ejectment would not give him all he is entitled to; and if I were to grant the injunction, I should be extending the jurisdiction beyond what justice requires. — *Motion refused, with costs.*

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January 13, 14, and 15, 1851.

Answer — Criminatory Interrogatories — Protection from Discovery — Stock-jobbing Act.

The plaintiff, contemplating stock-jobbing transactions through his brokers, transferred to them certain railway shares, for the purpose of securing to them any balance which might ultimately become due to them upon the contemplated transactions. Dealings and transactions accordingly took place. Plaintiff filed his bill against his brokers, alleging that there was a balance due to him upon those transactions, praying an account, and a re-transfer of the railway shares; and the bill contained numerous searching interrogatories as to the stock transactions, and the ownership of the railway shares. The defendants, by their answer, denied that there was any balance due to the plaintiff, on the transactions in question, but that, on the contrary, a balance was due from the plaintiff to them: they then set out the 8th section of the Stock-jobbing Act, 7 Geo. 2, c. 8, and stated that the plaintiff had alleged, prior to filing his bill, that the transactions in which they were concerned for him were prohibited by that act of Parliament; and they declined to answer the other interrogatories, on the ground that they jointly and severally believed that the discovery would tend to subject them, severally and respectively, to the penalties enacted by that statute:—

Held, affirming the decision of the Court below, that the answer was not insufficient, and that the defendants were protected from giving the discovery under the rule, that a person shall not be compelled to criminate himself. Extent of this rule discussed.

Semble, the rule as to protection from discovery, on the ground that it may tend to criminate the party, extends to every interrogatory which the party swears would form a link in the chain of the evidence by which the supposed guilt might be made out.

In this case, the bill stated, that in March, 1848, the plaintiff was entitled to certain railway shares, and that at that time dealings were contemplated, which took place, but the nature of which the bill did not disclose. The allegation was this: "That some dealings and transactions between the plaintiff and the defendants, brokers and agents, who were copartners in business, were in March, 1848, contemplated, in respect whereof it was probable that moneys might become due from the plaintiff to the defendants, and that it was agreed that the plaintiff should transfer the shares to the defendants as a security for the balance which might become due from the plaintiff to the defendants in respect of the said dealings and transactions;" that the plaintiff accordingly assigned and transferred the shares to, or in trust for, the defendants, and delivered to one of the defendants certificates of his being owner of other railway shares; that some dealings and transactions had afterwards taken place between the plaintiff and the defendants, but that all dealings and transactions between them had been concluded, and that no sum of money whatever was due from the plaintiff to the said defendants upon the balance of the account between them; and that the defendants then held the shares as trustees for the plaintiff, and had no lien or charge thereon; and it stated that a balance was due from the defendants to the plaintiff upon the transactions. It then stated that the plaintiff had applied for a retransfer of the shares deposited, and that the defendants refused to make the same; and it charged that the defendants ought to set forth the particulars thereafter inquired after; and they were

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interrogated as to a number of particulars of transactions between the plaintiff and themselves, and whether "the defendants do not pretend that the plaintiff was indebted to them, and that the defendants may set forth a full and true account of the particulars and amount of the said alleged debt, and how each and every part of the same arose and was constituted, and in respect of what contract or contracts respectively, and also all and every the dealings and transactions between the plaintiff and the said defendants, in respect of which the said alleged debt became due; and if the said defendants shall allege that they effected any sale or sales, or purchase or purchases, as the agents of the plaintiff, or otherwise acted as the agents of the plaintiff, that the said defendants may set forth the particulars of every transaction in which they acted as the agents of the plaintiff, the names and addresses of the several persons concerned in such transactions respectively, and the particulars of the respective things or subjects alleged to have been bought or sold by or on his account; and how and in what manner, and whether orally or by writing, the plaintiff authorized the defendants to act as his agents in such transactions respectively, and the nature, extent, and particulars of every such authority, and to whom the same was given; and whether the defendants do not allege, and whether it is the fact, that the defendants bought sums, and what sums, of stock on account of the plaintiff; and whether they do not allege, and whether it is the fact, that they, or some or one, and which of them, paid for the same; and whether they do not allege that the same sums, or sum of stock, were or was duly transferred to the plaintiff; and whether the plaintiff is indebted to them in respect of such purchases; and whether the plaintiff had the benefit of the purchases or purchase of stock so alleged to have been made for him; and whether the defendants have not received, by sales of stock made on account of the plaintiff, divers and what or some and what sums or sum; and that the said defendants may respectively set forth the particulars of each and every sum of stock which they allege that they have bought on account of the plaintiff, and when and from whom, and for what price each and every part of such stock was bought, and when and to whom each and every part of it was transferred after such purchase or purchases, and what became thereof." The bill then prayed an account of all the dealings and transactions between the plaintiff and the defendants, and that the amount due upon the balance of such account might be ascertained, and that the defendants might be decreed to pay to the plaintiff what might be found to be due from them on taking such account, and that the defendants might be decreed to retransfer to the plaintiff the shares transferred to them, upon the plaintiff paying them, as he thereby offered to do, what, if any thing, might be found to be due from him upon taking the said account. The defendants pleaded the act 7 Geo. 2, c. 8, called the Stock-jobbing Act, and averred that certain dealings had taken place between the plaintiff and them, relating to buying and selling of stock, in which dealings they acted as the plaintiff's brokers; that the plaintiff had alleged, prior to filing his bill, that such dealings were prohibited by the 8th. section of the above statute; that the said

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dealings were the dealings of which an account was sought by the bill; and that the defendants were advised that the discovery sought might subject them to penalties under the said act. Upon the plea being argued, it was ordered to stand for an answer, with liberty to the plaintiff to accept. The plaintiff took exceptions, fourteen in number, embracing every interrogatory in the bill, one of which was, whether the plaintiff "was not, on the — day of —, the owner of — shares in the — Railway Company." Five of these exceptions were allowed, and the Master's certificate, overruling the other nine, was excepted to, and those exceptions were allowed by his Honor, without prejudice to the defendants' right to insist, on their further answer, that they were not bound to give any further discovery as to the point on which the answer had been reported insufficient. The defendants then put in their further answer, in which they set out the 8th section of the Stat. 7 Geo. 2, c. 8, which enacts, "that all contracts which shall be made for buying, selling, assuring, or transferring any public securities whatsoever, whereof the person contracting, or on whose behalf the contract shall be made, to sell, assign, and transfer the same, shall not, at the time of making such contract, be actually possessed in his own right, shall be null and void: and that every person whatsoever contracting to sell, assign, or transfer any public securities, whereof such person shall not, at the time of making such contract, be actually possessed in his own right, as aforesaid, shall forfeit and pay the sum of 100*l.*, to be recovered in any of his Majesty's courts of record, at Westminster; and that all and every broker or brokers, agent or agents, who shall negotiate, transact, or intermeddle in the making, or procuring to be made, any such contract as aforesaid, and shall know that the person by whom, or on whose behalf, such contract shall be made, was not possessed of the stock or security concerning which such contract shall be made in his own name, shall, for every such offence, forfeit and pay the sum of 100*l.*, to be recovered by action of debt in any of his Majesty's courts of record at Westminster." They then stated, that on the last day of February, 1848, and thenceforward until the commencement of the suit, they were brokers or agents employed in negotiating and transacting sales and purchases of public stocks, and other public securities, and were in copartnership as such brokers or agents. They admitted that in March, 1848, some dealings and transactions between them and the plaintiff were contemplated, and that, in respect thereof, it was then probable that moneys might become due from the plaintiff to the defendants, and that some dealings and transactions had taken place between them and the plaintiff; and that in such dealing and transactions they were, and acted as, brokers or agents of the plaintiff; and that, to the best of their belief, the sum of 686*l.* 2*s.* 6*d.* was due from the plaintiff to the defendants. They admitted the applications alleged in the bill; and as to the other interrogatories, they declined to answer; "and for causes in that behalf, these defendants show and aver, that by reason of these defendants having been, during such time as aforesaid, such brokers or agents as aforesaid, and by reason also of the statute aforesaid, these defendants are advised, and do jointly

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and severally believe, that the discovery by these defendants, or any of them, of all or any of the matters or particulars hereinbefore by these defendants declined to be answered, or set forth, or discovered, would tend to subject these defendants, severally and respectively, as such brokers or agents acting as therein mentioned, to such penalties as aforesaid; wherefore these defendants crave to be protected by this honorable Court from making such discovery as last aforesaid, or any part thereof, and humbly pray the judgment of this honorable Court whether they shall be compelled to make any further or other answer to such parts of the discovery sought by the said bill as these defendants have so declined to answer as aforesaid." The plaintiff excepted to this answer for insufficiency, and the Master allowed all the exceptions but two, the fourth and sixth. The defendants took fourteen exceptions to the Master's certificate, all of which, with the exception of the first, which was unimportant, were allowed upon argument before Knight Bruce, V. C. (The case is reported before his Honor, 13 Jur. 835.) The plaintiff now appealed from that decision.

James Russell, C. M. Roupell, and J. Grey, (of the common-law bar,) in support of the appeal, contended, that the decision of the Vice Chancellor was wrong; that, taking both the bill and the answer together, the defendants did not show a reasonable probability that an answer to any of the interrogatories would subject them to pains or penalties; that this fact merely rested upon their oath, and that their oath was not to be respected, for that they pledged their oath to the existence of a *debt* from the plaintiff to them as the result of the dealings and transactions; and that this was clearly inconsistent with the notion that the dealings and transactions were illegal, for that a *debt* could not arise out of illegal transactions: that the plaintiff stated upon his bill a case of complete innocence; and that so far as the defendants stated any thing upon their answer, they also stated a case of complete innocence; and that the whole case for protection rested upon the mere suggestion that discovery might subject the defendants to pains and penalties; and that no case could be found, in which protection had been allowed, where there did not appear upon the record an allegation of circumstances which amounted to a breach of the law, whereby the pains and penalties would be incurred; but that here there was nothing more than an allegation of the existence of a certain law, and that pleading an act of Parliament is a mere nullity: that the decision of the Court below could not be supported upon the view of the Vice Chancellor, that this alleged agreement between the plaintiff and defendants amounted to a misdemeanor, and that, therefore, they might be indicted for a conspiracy, for this case was not set up by the defendants, and the Court can only look to the offence created by the statute pleaded, in deciding the question of protection from answering. They cited the following cases and authorities: *Green v. Weaver*, 1 Sim. 404. *Duncalf v. Blake*, 1 Atk. 52. *Cartwright v. Green*, 8 Ves. 405. *Claridge v. Hoare*, 14 Ves. 59. *Cates v. Hardacre*, 3 Taunt. 424. *Hitchins v. Lander*, G. Coop. 34. *Bul-*

lock v. Richardson, 11 Ves. 373. *Parkhurst v. Lowten*, 1 Mer. 391; s. c. 2 Swanst. 194. *Reg. v. Garbett*, 1 Den. C. C. 236; s. c. 2 Car. & K. 471. *The Earl of Cardigan's Case*, (in the House of Lords, separate report.) *Fisher v. Price*, 11 Beav. 194. Wig. on Discov. 61, 62, 1st ed.

Swanston and *Harris Prendergast* (*Willes* with them) said that the sole object of this bill was to get back from the defendants the railway shares which were deposited with them as a security for the settlement of the dealings and transactions, without ascertaining what the result of the accounts was. They commented on the cases cited by the other side, all of which, with the exception of *Green v. Weaver*, were in their favor; and they submitted, that if any doctrine had been propounded in *Green v. Weaver*, it had never been adopted by subsequent cases, and was decidedly opposed to *Paxton v. Douglas*, 16 Ves. 239, 242, 19 Ves. 226; that *Glynn v. Houston*, 1 Kee. 329, was the only case in which *Green v. Weaver* had been referred to, but that two circumstances in that case differed it most materially from the present, namely, first, that there was no illegality as between the plaintiff and defendant, and the transaction would have been quite free from illegality had the defendant been what he had held himself out to be; secondly, Sir Anthony Hart thought, in that case, that there was some personal matter that deprived the defendant of his privilege. They referred also to *Thorpe v. Macaulay*, 5 Mad. 218, 229, 230. *Macaulay v. Shackell*, 1 Bligh. (n. s.) 96. *Southall v. —*, 1 Younge, 308. *Lee v. Read*, 5 Beav. 381. *Schultes v. Hodgson*, 1 Add. Ecc. Rep. 105, 112. *Baker v. Pritchard*, 2 Atk. 387. *Honeywood v. Selwin*, 3 Atk. 276. They also submitted, that it was not necessary for them to contend here for the full extent of the proposition which might be contended for, namely, that the oath of a defendant, that the discovery sought might subject him to pains and penalties, would be sufficient to protect the party from discovery,—upon which point they referred to *Purcell v. Macnamara*, reported in Wig. on Discov. 209, 1st ed.,—for that here the circumstances of the entire case showed the great probability of the truth of the oath; but that, if there was any doubt, the Court would lean in favor of protection, referring to the examination of Sir James Anderson in *Lord Cardigan's Case*.

LORD CHANCELLOR. Questions of this kind are always of considerable importance, although not always of any great difficulty, because what has fallen from the Bar has manifested, first, the great importance and value of the rule; and, secondly, the very extensive opportunities for evasion of doing that which justice calls for, under pretence of the rule; and as the rule is one always admitted to be of the greatest importance, it is a serious duty upon every judge, who is called upon to act under the administration of the rule, to see, as far as he can, that it is not one of the occasions in which the party asks to evade doing that which justice requires, under pretence of the rule. On the other hand, it is equally, if not more,

imperative upon the Courts to take care that they do not peril the existence and application of a rule admitted to be of the very first importance to justice, as affording protection to individuals against that which, in point of fact, is a degree of torture, by which to extort confession. That is the result of it. Whether the torture is by commitment for not answering, which is one description of torture, or whatever else, does not matter. The principle of the law of England is, that a man shall not be driven to give answers to matters that tend to criminate himself. When it is said that a man shall not be coerced, it means that a man shall not be put to the lower degree of torture, to which alone the law of England can subject him, by fine and imprisonment. I have said already that the application of the rule is always important, but not always difficult.

Now, the question is, whether the defendants, upon the present occasion, have shown to the Court sufficient circumstances to entitle them to credit for the oath which they have made, and to protect them from answering the questions put to them upon the bill, or any of them, indeed, particularly to those parts to which the exceptions apply. They say, we cannot answer them, because the answer will tend to bring us into peril in regard to the offences created by a certain act of Parliament. Now, what is the case presented upon the part of the plaintiff? He says that he was the owner of certain shares; that he contemplated dealings and transactions with the defendants, and, in order to secure the defendants against pecuniary loss in respect of those transactions, he transferred to them the shares of which he was then possessed. Those dealings and transactions did take place, and the whole frame of the bill would import that the dealings and transactions were of the description of those contemplated. There is nothing to the contrary; but, on the other hand, they are so treated as if they were the very dealings and transactions from loss by which it was the object to secure the defendants against the consequences by the deposit of the shares. And then the plaintiff says, that, in the course of those dealings and transactions, the defendants sold stock for me, and, by means of the sale of that stock, they received money enough to pay all that I ever owed them; therefore I ought to have my shares back again. The object of the bill is to procure the retransfer of those shares, upon the footing, that by those stock transactions the defendants have been repaid all that the plaintiff owed them. The plaintiff himself, therefore, brings the dealings and transactions, in respect of which he deposited his shares, into connection with stock transactions. He does not say that he has ever applied to the defendants for an account, and that the defendants refused to account, but he says that he applied to them for the shares back again without an account, and that the defendants refused; and then the bill goes on with the general allegation, imputing to the defendants the receipt of the shares; and a variety of questions, as to the dealings and transactions, are particularly put. Then, if the defendants say they sold stock, or lost by stock, or any thing is due to them, there are the questions how much, when, and to whom, and what became of the stock; and, in fact,

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every question which could be material for the purpose, not merely of eliciting whether, in the result of the account, there was any thing due to the defendants, because there is a great deal quite immaterial to that, but enough to fix the defendants with the penalties if they have acted illegally.

There are a great many interrogatories, obviously quite wide and quite immaterial to the matter of the account between the parties, but which would be essential to fix the defendants with the penalties; therefore one cannot disguise from one's self that the object of the plaintiff is to get back a security deposited on certain stock transactions, without having the result of the account with his brokers; in other words, taking advantage of the illegality of the transactions between the defendants and himself in regard to stock, in order to evade the consequences of a losing gambling transaction. That makes no difference in regard to the application of this rule. It is only material, and I only advert to it, for the purpose of showing what is the state of facts under which the defendants claim the protection, guarding my own mind, I believe effectually, against any possible prejudice which might arise from the circumstance of the plaintiff seeking to take an unjust and dishonest advantage of his brokers; because no one can doubt, that, however illegal it may be, as honesty is said to prevail among a certain class of persons, so you might expect it to prevail among persons engaged in gambling transactions: whether it prevailed in the present case, I do not know. I believe I am not influenced by any opinion that I form in consequence of any prejudice, supposing the case to be tainted in the way I have suggested. Now, such is the plaintiff's case: Tell me if I am not the owner of shares: tell me, if you say there is any thing due to you, for what. If it is for stock, give me such and such particulars. The defendants say, Before you filed your bill, you told us that our dealings and transactions with you were all illegal, for that they related to the sale of stock of which the seller was not possessed at the time of the contract.

Now, as you have put us upon our guard, and as the interrogatories are all directed to fix us with the penalty of that, not only to deprive us of the advantage of our lien, but also to fix us with penalties, we will not answer one word about those shares, which are part of the transactions connected with the stock to which your interrogatories have referred. Now, it appears that dealings and transactions have taken place between the plaintiff and the defendants in regard to stock: the plaintiff has challenged the defendants that they were illegal. It seldom happens that a case presents such plausible grounds for the objection that is now set up, as that the party himself seeking the discovery has charged the very illegality which the defendants seek to protect themselves against. Now, the rule, I apprehend, however necessary it might be to examine it in reference to certain cases, is sufficiently broad to enable me, without occupying time in going through the cases, and stating the same thing in an infinite variety of forms of expression — it is broad enough, as generally understood, to enable this case to be disposed of: it is, that a man shall not be

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bound to answer that which tends to criminate himself. I understand the rule to be, that if you ask a man to tell you how evidence can be got by which you can fix him, you ask him to tell you that which tends to criminate himself—that is the tendency of it. It has been ably and ingeniously argued, and constantly repeated, that this never could form any link to the chain. Now, I put the link distinctly to the learned counsel, to have the benefit of his great talent and experience; but I received no satisfactory answer to my observation. I will repeat the links of the chain, and then take away the link which this bill seeks to construct, and then see how the case will stand—an action against the brokers for selling stock of which their principal was not possessed, whereby they have forfeited 100*l.* under the statute of George II.

Now, what is the link between the plaintiff's claim and a verdict against the defendants? A contract for sale of stock made by the defendants as brokers. That is one fact to be proved; that may be proved in various ways. The next step is, that the contract was made on behalf of the owner of these shares. How is that to be proved? By conversations which may have taken place on the Stock Exchange; as, for instance, "I am dealing safely, for the bargain I have made is for the owner of shares transferred to me." Now, I will show, if you please, that the owner had no stock at the time of the contract. I must first know who he is. "Here is the answer in Chancery, which will tell you who he is—it is Mr. Short." Now, the present point is to show that the owner had no stock at that time; the bank books will show that Mr. Short had no stock. Now, these are the four links in the chain; take away this answer, and see how the action will stand. Now, I put that case to the learned counsel, but I was not fortunate enough, paying every respect to what was addressed to me, to see that it was at all touched. But a defendant is not bound to show how it will affect him; to do that, he would oftentimes of necessity deprive himself of the benefit of the protection, and it never has been required. It is difficult to say how little or how much is required, but this at least will satisfy the rule: if a party states circumstances which on the face of them are not only consistent with the existence of the peril which he states, but which also render it *extremely probable*,—it may be stated in much less forcible terms than that,—he entitles himself to the protection. Then how do the facts of this case apply to the rule? There have been stock transactions between the parties: those stock transactions are mixed up with shares of which the plaintiff claims to be the owner, and he claims to be entitled to those shares because the stock transactions have put the defendants in sufficient funds to satisfy his demand; and he has told the defendants that those transactions, or some of them—no matter whether they are all or not, for it is nothing to say some may be legal and some illegal; you may not be able to discover some of the transactions, because they may not be independent of the other, but are so mixed up, that when you are giving an account of the whole, you open the door and point out the manner in which the illegality may be established—but the defendants

say, "You have told us that was illegal: very well; if you are going to charge us with that, we will set up the statute, in order that we may not furnish you with any information which will enable you or any person else to fix us with those penalties;" and the Court would be disposed to assist them in that case.

But the important fact to be established is, that the sale of the stock was made on behalf of a person who did not possess the stock at the time: that may be made out by direct, by circumstantial, or by circuitous evidence. This fact might be, on that ground, found extremely material as circumstantial evidence; nay, it would amount to positive testimony. Therefore, looking at this as a case in which, with regard to the transactions connected with the shares, the plaintiff has charged illegality, the defendants swear they cannot give an account without putting themselves in peril. It is nothing, in a case of this sort, to say, Why, here the fact I ask you is the simplest in the world; there is no illegality about it. The question is not whether there is illegality about the particular transaction, insulated, unconnected, and apart; but if it is part of the transaction,—one of the circumstances and one of the evidences of it,—then I apprehend, that if a man fails to answer, who alone knows all the circumstances, who alone knows how that fact is to be connected with others which are to be the chain of connection,—the evidence by which guilt is to be established,—and he swears such is the fact, the rule prevails. Now, I admit there may be many cases in which it would be extremely difficult, indeed, to say enough is disclosed to satisfy the judge that a privilege ought to be allowed. The difficulty of that was very much discussed and considered in the case of *Reg. v. Garbett*; and it will be observed that the judges were very cautious, as the case did not require it, in delivering any opinion upon that subject. I own I feel myself relieved here, because, looking at this case, I can see how directly, not one, but, if it were necessary, I am sure I could say many cases, in which this fact would be all important in a criminal proceeding against the defendants. They have, in my mind, stated circumstances which render it possible that they may be in the peril they state. I think it extremely possible; and we must not forget, in estimating the degree of probability, the circumstance, that the plaintiff himself charged that the transactions were illegal, and illegal on the very ground that subjects the party to penalties. That is not immaterial. It seems to me that the conclusion of the Vice Chancellor was perfectly correct.

The learned counsel has addressed me on the apparent inconsistency of allowing the plea to stand for an answer, and allowing exceptions as to its insufficiency in the first instance, and then allowing an answer to be sufficient afterwards. I do not think that is of very much importance if the learned counsel is right; but I do not think it necessary to enter into the investigation of that, having arrived at a satisfactory conclusion in my own mind that the defendants have stated a sufficient case to entitle them to credit on their oath, that the consequence might follow which justifies them in setting up the objection. I think, therefore, that this appeal must be dismissed, with costs. — *Appeal dismissed, with costs.*

 Grove v. Young.

GROVE v. YOUNG.¹

November 9 and 21, 1850.

Practice — Expense of executing Commission for the Examination of Witnesses.

A commission for the examination of witnesses being issued, witnesses were examined under it, both by the plaintiff and the defendant. The Court held, that the defendant was liable to pay his proportion of the expenses of the execution of the commission.

THIS cause being at issue, a commission was issued for the examination of witnesses, to a commissioner proposed by the plaintiff, his solicitor having the carriage of the commission. The defendant joined in the commission, and witnesses were examined under it, when it was executed, both on the part of the plaintiff and the defendant. The solicitor for the plaintiff paid the commissioner's and clerk's fees, and the charges for the room where the commissioner sat, and for parchment and stationery. The commission was duly returned, and the depositions were published. The examination and cross examination of the plaintiff's witnesses occupied six days and a half, and that of those for the defendant seven days and a half, the latter being only examinations in chief, without any cross examination by the plaintiff. On application to the defendant's solicitor for payment of his share of the expenses, he declined to bear any part of them.

Malins and *Rasch* moved, on behalf of the plaintiff, that the defendant might be ordered to pay to the plaintiff 76*l.* 19*s.*, the amount of the defendant's proportion of the plaintiff's charges and expenses of and attending the execution of the commission. They said, that where a defendant does no more than cross examine the plaintiff's witnesses, he pays nothing; but where he examines witnesses for himself, he must bear his proportion of the expenses.

Beales opposed the motion, on the ground that, as it was uncertain whether the defendant might not turn out to be right in the suit, and the plaintiff have to pay all the costs, it might be that the defendant, paying part of the expenses of the commission, would lose that money by the insolvency of the plaintiff. The cases of *Stockhold v. Collington*, 1 Salk. 330; *The Earl of Lucan v. O'Malley*, 2 Jo. & Lat. 681; *Jackson v. Strong*, 13 Price, 309; *Blundell v. Gladstone*, 9 Sim. 456; and *Ambrose v. The Dunmow Union*, 8 Beav. 43, were referred to; also Dan. Ch. Pr. 894, 908.

Knight Bruce, V. C. I will ask the opinion of the officers on the point.

November 21, 1850. The following statement of the question, and the answer of several of the officers, were this day delivered out: —

¹ 15 Jur. 97.

Smith v. Constant.

"Under the commission issued forth for the examination of witnesses, both the plaintiff and the defendant examined their witnesses. Is or is not the defendant liable to pay his proportion of the expenses of the execution of the commission?"

"The undersigned Registrars and Clerks of Records and Writs are decidedly of opinion that the defendant is liable to pay his proportion of such expenses.

"J. Collis,	F. R. Bedwell,
R. O. Walker,	Cecil Monro,
H. W. Davis,	Frederick Bedwell,
Henry E. Bicknell,	J. A. Berrey,
H. Hussey,	John Veal,
H. Wood,	Seth Charles Ward."

By agreement between counsel, the defendant was ordered to pay half the expenses, and not his proportion, which would have been rather more than half.

SMITH v. CONSTANT.¹

January 20 and 27, 1851.

Practice — Claim — Evidence — Affidavits — Orders of 1850 — Additional Affidavits at Hearing.

Claims may be decided on affidavits on both sides on a contested matter of fact, or the Court may, if it sees fit, direct a bill to be filed, or direct proceedings at law.

When, at the hearing of a claim, a fact is alleged by the plaintiff on his own affidavit, (which affidavit the Court will not receive as evidence,) but which fact is not admitted by the defendant, the Court will direct the claim to stand over, in order that the fact may be otherwise substantiated.

The affidavit of the defendant has the same degree of weight as an answer.

In this case a claim was filed by an equitable mortgagee to enforce her security. It was alleged that the defendant, Mr. Constant, having occasion for a loan of 500*L*, applied to the plaintiff, Mrs. Smith, who agreed to advance the money, and, as she alleged by her claim, did so on the defendant depositing with her his title-deeds, together with a memorandum in his handwriting, but not signed, stating that the deeds were to be returned on payment of 500*L*, and interest at the rate therein mentioned. The defence set up was, that the money never was, in fact, advanced, but that the deeds were placed in Mrs. Smith's hands, and the memorandum also, with a view to a future loan, and not as a present security. The evidence was extremely conflicting. The other facts were fully detailed in the judgment of the Court, but they are not of importance, nor is the case one to render a report of any moment, excepting on account of its bearing on the new system of suit by claim, and the evidence to be received.

¹ 15 Jur. 97.

Smith v. Constant.

In the claim, and in the affidavit of the plaintiff, it was alleged that the memorandum of deposit was in the handwriting of the defendant, but otherwise this fact was not proved on the plaintiff's behalf. The defendant, in his affidavit, set out the memorandum in so many words, and admitted that he prepared it, although he did not say it was in his handwriting, but he said he believed he did write it.

Roundell Palmer. I propose to read the plaintiff's affidavit to prove the handwriting of the defendant in the memorandum of deposit. [*Knight Bruce*, V. C. — I cannot permit the plaintiff to be a witness on her own behalf on a suit by claim, any more than I could had she filed her bill.] The affidavit of the plaintiff as to this fact being excluded, I offer the affidavit of the defendant to show that he has expressly admitted the memorandum to be in his handwriting, and I tender that as part of the evidence in the cause.

Russell objected to the affidavit being read by the plaintiff, unless as part of her own evidence, and then the whole to be read, in the same way as his answer would be to a bill.

Roundell Palmer. I object to read the whole as if it were an answer, and shall request the claim to be allowed to stand over for further evidence. The whole tenor of the Orders constituting this new mode of suit by claim shows that the Court is to deal with such matters in all respects in the same way as if it were hearing a motion. If this be not so, then the practice giving a right to sue by way of claim is a mere fraud, a delusion, and a snare.

W. T. S. Daniel, on the same side.

Russell and *W. D. Lewis* argued that the intention of the framers of the system of suit by way of claim was not that the whole course of law should be revolutionized, nor even that the whole system of evidence should be changed. Where the contest is as to a matter of fact, the Court ought not to proceed with the hearing, but suspend it, or rather dismiss the claim and direct a bill to be filed, or an action to be tried. Facts being disputed, no affidavits ought to be received. The plaintiff has filed her claim, and as she cannot be a witness for herself, and having defectively brought her case before the Court, she must take the consequence. As soon as this Court sees that there is a grave question of facts alleged on one side, and denied on the other, it ought at once to direct a bill to be filed, and thus admit the old rules of evidence to prevail. If these Orders had been intended to overturn the settled law of the country, that intention would have been clearly expressed.

Malins, (*amicus Curiae*), during the argument, stated, that in a case, in which he was counsel, before Lord Cranworth, his Lordship had decided, that, affidavits of fact being conflicting, he would direct a bill to be filed. Having, at the request of his Honor, asked of his

that way. In each case, where such a question arises, the Court must exercise, as well as it can, a judicial discretion, applied to the particular circumstances. If the Court is asked not to proceed upon affidavit evidence, in order that a suit in equity, in the ordinary mode, may be instituted, that is one thing; if it is asked not to proceed to decide upon the claim, in order that there may be an investigation before a jury, that is another. Now, when the demand is for an investigation before a jury, it cannot probably make much difference whether the proceeding in this Court is by claim or by suit in the ordinary way. If, however, the objection is, that the matter ought to be decided in a suit constituted of bill and answer, and the disputed matter be of fact only, and not of law, I really do not see the great difference, in any important respect, between proceeding upon affidavits and proceeding upon interrogatories and depositions; seeing that, according to all experience, the faculty of effectual cross examination in proceedings in equity is a faculty almost worthless to possess, and one the exercise of which seldom assists the person who seeks to avail himself of it. I confess, therefore, I consider the present case quite as fit to be decided under a claim upon affidavits, as it would be by a suit regularly, that is, ordinarily, constituted. The question then being, whether the nature of the case is such as to render it essential or important to justice that there should be an investigation before a jury, to that I have principally addressed myself, and am now addressing myself. [Here his Honor entered into a detailed statement of the facts of the case, and minutely sifted the evidence. He then proceeded:] The entire case of the defendant is then, for every substantial purpose, reduced to his own affidavit. Now, he cannot be a witness for himself, any more than the plaintiff can be a witness for herself; but he has, in my opinion, this advantage — that in a case of the present kind, his affidavit ought to be considered as having the same degree of weight and influence as an answer would have had if the case had been by bill, answer, replication, and evidence upon interrogatories. But the rule in these cases is, that you must look at circumstances and probabilities; and the mere circumstance, that the defendant denies a fact proved against him by a single witness, is not sufficient, if there are circumstances giving additional weight and value to the testimony of that particular witness. Now, there are, in my opinion, proved circumstances, independently of the main facts in dispute, which cannot be questioned, and which invest the defendant's case with circumstances of improbability, which render its authenticity doubtful in the extreme. . . . I think, to send a case of this description, so clearly and plainly proved in my opinion, to a jury, would be mere oppression — a mere evasion of the performance of duty. Considering the question apart from the plaintiff's evidence, and that she has proved her case, and treating the defendant as a witness for himself, and considering that his evidence is disproved, I think she is entitled to the decree she asks. There must, therefore, be the usual equitable mortgagee's decree.

 Underwood v. Jee.

UNDERWOOD v. JEE.¹

December 11 and 13, 1850.

Two Suits — Inquiries.

The bill in a creditors' suit was filed by a creditor entitled to the payment of a sum of money out of the intestate's assets, after the death of a person then living, and charged that the administratrix had carried on the intestate's business since his death at a loss, and had misapplied assets. Another creditors' suit was instituted, in which an inquiry was directed, whether the carrying on the trade from the date of the order was beneficial. The first suit having come to a hearing, it was held, that relief was prayed which could not be had in the second, and an inquiry was directed, whether the carrying on the trade had been beneficial from the death of the intestate up to the date of the former order.

THE bill in this case, filed on the 11th December, 1848, was by a creditor on the estate of John Jee, deceased, for the sum of 3429*l.*, payable after the death of a certain Elizabeth Jee. The bill charged that the administratrix had possessed herself of assets, but had misapplied them, and had neglected and mismanaged the intestate's trade, and had carried on the same at a loss, or, if she had made any profit, she had applied the same to her own use; and prayed an account of the intestate's estate, and of the gains, if any, made by the administratrix in carrying on his trade, and that what should be found due on taking the last-mentioned account might be applied in paying or providing for the said debt of 3429*l.*, and paying the other unsatisfied creditors of the intestate; and it prayed a receiver and injunction against the administratrix. The administratrix, by her answer, filed on the 15th February, 1849, admitted that she had carried on the intestate's trade, but alleged that she had made a profit by it. Shortly after the filing of the bill in this suit, another creditors' suit (*Smith v. Jee*) was instituted, and the usual creditors' decree obtained on the 24th February, 1849. That decree was varied by an order of the 17th April, 1849, referring it to the Master to inquire whether it would be fit and proper, and for the benefit of the estate of the intestate, that the business should be carried on; and the Master, on the 20th July, 1849, made a report, approving of the business being carried on till the 19th October, 1851; and on the 23d November, 1849, another order was made, in *Smith v. Jee*, to take an account of the profits since the intestate's death. On the 27th March, 1849, the defendant moved, before the Vice Chancellor of England, to stay proceedings in *Underwood v. Jee*, which motion, and also a renewed motion before the Lord Chancellor, was refused, with costs. 1 Mac. & G. 276. The suit of *Underwood v. Jee* now came on for hearing.

Roll and Simons, for the plaintiff.

Bethell and Miller, for the defendant, contended that this bill ought to be dismissed, with costs. The charges in the bill, of mismanagement, were not supported by any evidence, and were entirely denied

Underwood v. Jee.

by the answer. It appeared from the Lord Chancellor's judgment, that if the suit proved to be unnecessary, the bill would be dismissed, with costs; and it had proved so, as the plaintiff had made out no case to support his allegations, and he could have obtained every thing for which he had made out a case in the other suit. The debt did not arise for an indefinite time, and in the interim the defendant was entitled to carry on the business which had been found to have been profitably carried on. The plaintiff, if he could not make out his case, ought to have stayed proceedings, and would have had his costs, as soon as he had notice of the decree in the other suit.

Rolt, in reply. The question is, whether the administratrix is to carry on the business uncontrolled: the plaintiff wants some control, and some security that the assets shall not be lost in trade. The other suit is a friendly suit, and may be carried on till all the property is lost. We want, in fact, an inquiry whether the other suit has been properly carried on. Besides, we want an inquiry as to the carrying on the business anterior to the order of the 20th July. It may, perhaps, have been profitable hitherto to the estate of the intestate,—that is to say, to the next of kin,—but it may turn out that the assets may have been risked and lost; whereas, had it all been realized at the death of the intestate, there would have been enough to pay all the debts.

ROLFE, V. C. The only point which presses on my mind is, that the plaintiff says he is entitled to an inquiry, which has not hitherto been directed. The administratrix may have made considerable profits, and yet the carrying on the trade may not have been profitable to the creditors. If that is the case, it ought to be shown by a suit for that purpose, or by a petition in the cause of *Smith v. Jee*.

December 13, 1850. ROLFE, V. C., said, that the facts of this case appeared to be these: Underwood, the plaintiff, was a creditor of the intestate, and filed a bill, as a creditor, against the widow and administratrix, for the usual accounts, on behalf of himself and the other creditors. In that bill there was a charge that the defendant had not applied the assets in a due course of administration, and had carried on and mismanaged the intestate's trade, which seemed to have been considerable, and had carried it on at a loss. After the filing of this bill, another bill was filed by a creditor, and a decree in that suit obtained, and no doubt in that suit all ordinary relief could be obtained. A motion was made to stay proceedings in the suit of *Underwood v. Jee*, but that motion was held not to be proper, because this bill prays something beyond what the decree in *Smith v. Jee* provided for. *Underwood v. Jee* was now come to a hearing, and the question was, whether Underwood was entitled to any relief which could not be obtained in the suit of *Smith v. Jee*; and his Lordship came to the conclusion reluctantly that he was so entitled. His Lordship said reluctantly, because the inquiry would be, no doubt, fruitless. After the death of Jee, his widow continued to carry on the trade till the

 Russell's Trust.

suit of *Smith v. Jee* was begun; and, after the decree in that suit, an inquiry was directed whether it was for the benefit of the parties interested that the trade should be carried on. It was alleged in this suit that the widow possessed herself of assets, and misapplied them. She said she carried on the trade beneficially; and the result of the inquiry was, that it was beneficial, at the end of two years from the death of the intestate. But it did not necessarily follow, that because from April, 1849, it was expedient that the trade should be continued to be carried on; therefore it was necessary to be carried on from the beginning; and the plaintiff was now entitled to an inquiry whether it was for the benefit of himself and the other creditors that the administratrix should have carried on the business during that period. There was nothing to lead the Court to suppose there was any want of *bona fides* in that other suit; but if the Court felt the greatest doubt, it could not be alluded to in this suit.

Let the Master to whom Smith v. Jee is referred, make an inquiry whether it was beneficial to the plaintiff and the other creditors to carry on the business from the death of the intestate to the date of the second order. Reserve the costs of this suit, and further directions in Smith v. Jee. Stay proceedings in this suit.

 RUSSELL'S TRUST.¹

January 24 and 29, 1851.

New Trustees — Transfer of Stock.

New trustees are persons absolutely entitled to stock in the funds, within the trustee act, 1850, and may apply to the former trustee for a transfer. On his refusal, the Court will appoint a person to transfer in his place. Difficulty of obtaining a transfer of stock under that act.

The circumstances of this case appear from the report of the judgment.

Bevir, for the petitioners.

January 29, 1851. LORD CRANWORTH, V. C. I have had very great difficulty about this case. You seek for new trustees under these circumstances: Mr. and Mrs. Russell, subsequently to their marriage, transferred a sum of stock to trustees. It was transferred into the names of two persons, without obtaining the consent of one of them to the act. One of those persons is since dead, and the stock remains in the name of the sole trustee, who refuses to do any thing with it, and you want new trustees. What has been done is this. Under the provisions of the deed, there are powers of appointing new trustees, and new trustees have been appointed. I take it

¹ 15 Jur. 100.

Russell's Trust.

for granted that they are properly appointed. Then you want to have the stock transferred. It is a great misfortune that there is no enactment in the act stating that it may be done; but what the act 13 & 14 Vict. c. 60, says, is this, (sect. 24,) that where any one of the trustees of any stock shall refuse to transfer such stock, or to receive the dividends thereon, according to the directions of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him or her by such person, it shall be lawful for the Court of Chancery to make an order vesting the right to transfer such stock, or to receive the dividends thereon, in the other trustee or trustees of the said stock. Now, the first question which arises is this: Suppose the proper notice has been given, and the proper petition presented, what order is the Court to make? The obvious meaning is, that the stock is to be vested in the new trustees; but all that the clause authorizes is the sole right to transfer the stock to such person as the Court shall appoint. Suppose I were to vest it in the new trustees; they could never perform the trusts, and somebody must be appointed to transfer the stock. I am, however, relieved from all difficulty, because the framers of the act have retained the power, where there is any difficulty, to use the old way; and I may, therefore, order the secretary of the bank to transfer; and that would be the course I should pursue in a proper case; but this can only be done when the application, twenty-eight days before, has been made by the person *absolutely entitled* to the stock, which must mean the person *absolutely entitled* to the principal. If I had any doubt about the meaning of these words, I must construe them with reference to the former act, 1 Will. 4, c. 60, s. 10, and these were not the words in that act, where it is directed, that if any person shall neglect or refuse to transfer such stock, or receive and pay over the dividends thereon, to the person entitled thereto, the application shall be made by the person *entitled as aforesaid*; and these words being left out here, it must be assumed that it was done advisedly. I think, however, that I see a way out of the difficulty. By sects. 23 and 24, the order can only be made on the application of the person absolutely entitled; but sect. 37 says, that any order concerning any stock subject to a trust may be made upon the application of any person duly appointed a trustee thereof. That section alone does not authorize it, but says that where, under the former section, the Court has power to order any thing to be done, that may be done upon the application of the trustees. Therefore I do not think, that upon the application of any person, except the person absolutely entitled, any order can be made under sect. 24. But Lord Langdale has decided, that, under the 37th section, a trustee is a person absolutely entitled, and he may have so dealt as to become equitably, as well as legally, owner. But, at any rate, Lord Langdale has decided that the refusal does bring the case within the act of Parliament; it is a convenient construction, and may enable me to get out of the difficulty; but not upon this petition, for no application to the present trustee has been made by the new trustees. If the new trustees apply, and there is a refusal, I may upon that refusal make the order. — *Petition dismissed.*

CASES

ARGUED AND DETERMINED

IN THE

COURT OF QUEEN'S BENCH;

AND UPON

WRITS OF ERROR FROM THAT COURT TO THE EXCHEQUER CHAMBER.

COMMENCING WITH MICH. TERM, 14 VICTORIÆ, 1850.

LLOYD v. HOWARD.¹

November 4, 6, 1850.

Bill of Exchange — Indorsement — Delivery for a special Purpose.

A, being the payee and holder of a bill of exchange, wrote his name upon it, and gave it to B for the purpose of getting it discounted. B never paid A any money in respect of the bill, but kept it until it was overdue, when he delivered it to C without receiving any value for it:—

Held, that there was no indorsement by A to B.

Quære, whether there was any indorsement by B to C.

ASSUMPSIT on a bill of exchange drawn by G. A. H. Chichester upon and accepted by the defendant for 300*l.*, three months after date, payable to the order of Chichester, and by Chichester indorsed to W. Milton, and by Milton indorsed to the plaintiff.

Pleas — First, that the defendant did not accept; second, that Chichester did not indorse the said bill to Milton; third, that Milton did not indorse it to the plaintiff. Issues thereon.

At the trial, before Wightman, J., at the Sittings in Middlesex, after Michaelmas term, 1849, it appeared that the defendant, being desirous to raise money, drew the bill in question, and delivered it to Chichester for that purpose. Chichester accordingly wrote his name upon the bill, and gave it to Milton, (who was a horse-dealer, and connected with bill transactions,) for the purpose of getting it discounted, and in the expectation of receiving money for it, or of having the bill again. Milton kept the bill until it was overdue, saying that he could not get it discounted, and never paid any money for it to Chichester, and it ultimately came into the hands of the plaintiff. The jury, in answer to a question from the learned Judge, found that the plaintiff had taken the bill from Milton after it was due, and without any value or

¹ 20 Law J. Rep. (n. s.) Q. B. 1.

 Lloyd v. Howard.

consideration for it. The Judge accordingly directed the verdict to be entered for the plaintiff on the first issue, and for the defendant on the second and third issues. A rule *nisi* was afterwards obtained, on behalf of the plaintiff, for a new trial, on the ground that, upon the facts proved, there was a regular indorsement to Milton, and by Milton to the plaintiff; against which

D. D. Keane showed cause, (November 4.) The facts proved show that there was no indorsement either to Milton or to the plaintiff; and if they had been pleaded specially, the pleas would have been bad, as amounting to a traverse of the indorsement. Now, Milton was only employed as an agent for the purpose of getting the bill discounted; and, therefore, the delivery to him was merely for the special purpose of transferring it to the person from whom he got the money. Milton, therefore, never could himself become a transferee of the bill. *Jones v. Corbett* 2 Q. B. Rep. 828; s. c. 11 Law J. Rep. (N. S.) Q. B. 181. *Adams v. Jones*, 12 Ad. & E. 455; s. c. 9 Law J. Rep. (N. S.) Q. B. 407. *Hayes v. Caulfield*, 5 Q. B. Rep. 81, and *Marston v. Allen*, 8 Mee. & W. 494; s. c. 11 Law J. Rep. (N. S.) Exch. 122. — *Bell v. Lord Ingestre*, 19 Law J. Rep. (N. S.) Q. B. 71, is very much in point. There, the question whether the delivery of a bill upon a condition was an indorsement was much discussed, and the Court held, in analogy to the principle of an escrow, that it only became an indorsement when the condition was complied with. The remarks of Wightman, J., there, are strictly applicable to the present case. He says, "The analogy to an escrow would be perfect if this bill had been delivered, not to the party intended to take it ultimately, but to another, who was to hand it over to the party entitled in a certain event." That is just the case here. *Goggerley v. Outhbert*, 2 N. R. 170, was also referred to. Then, as to the indorsement to the plaintiff, who took the bill after it was due, and without value from Milton, the rule laid down in *Marston v. Allen* is decisive: "Every person having possession of a bill has (notwithstanding any fraud on his part either in acquiring or transferring it) full authority to transfer such bill, but with this limitation, that, to make such transfer valid, there must be a delivery, either by him or by some subsequent holder of the bill, to some one who receives such bill *bonâ fide* and for value, and who is either himself the holder of it, or a person through whom the holder claims. Any thing, therefore, which shows that this restriction applies, shows that the party making the transfer had no authority, and that the transfer is not valid." *Musgrave v. Drake*, 5 Q. B. Rep. 185; s. c. 13 Law J. Rep. (N. S.) Q. B. 16, shows that a plaintiff will be affected by knowledge of fraud in the prior history of the bill.

Shee, Serj., and *Hawkins*, in support of the rule. All the cases cited for the defendant are mere repetitions of the principle laid down in *Marston v. Allen*, that to constitute a valid indorsement there must be an intention to pass the property in the bill by the indorser. Applying that to the present facts, *Chichester* and *Milton* both clearly intended to pass all the property in the bill, and therefore they indorsed it.

Lloyd v. Howard.

[ERLE, J. A delivery of a bill for a special purpose is no indorsement.]

That is so, if the bill is delivered to be held for the party delivering, or for some other person. Here it was given to Milton without any condition, and for the purpose of negotiating it, and therefore he had a full right to pass it to the plaintiff.

[LORD CAMPBELL, C. J. When did the plaintiff get a title to the bill?]

As soon as it was delivered to him with Milton's name upon it.

[LORD CAMPBELL, C. J. If Milton had no inchoate right of action then upon the bill, how could the plaintiff afterwards acquire any right upon it? I do not see how there can be an indorsement which does not pass to the indorsee both a right of property and a right to sue on the bill.]

The two indorsements must be looked at separately. The fact of Milton having parted with the bill to the plaintiff in fraud of Chichester does not render it less an indorsement to the plaintiff. Such a defence might be available on a special plea, but it does not arise on a mere traverse of the indorsement. — *Cur. adv. vult.*

On the following day, (November 6,) the Judges delivered their opinions: —

LORD CAMPBELL, C. J. We all agree that not only is the justice of the case with the defendant, but the law also, if he has taken advantage of the defence open to him by properly pleading; and upon that I felt some doubt; but I think, consistently with what appears to me to be the correct rule of law, the defendant is entitled to our judgment upon the plea alleging that Chichester did not indorse the bill to Milton. Had the plaintiff taken the bill for a good consideration before it became due, and became the *bonâ fide* holder, he would have been entitled to maintain an action against the acceptor, and the defendant could not enter into the question of how Milton had got possession of the bill from Chichester. But, here, the jury have found that the plaintiff received the bill after it was due, and without consideration. He, therefore, took it subject to all the disabilities attached to it, and must be considered as standing in the shoes of Milton, and having no better title than Milton had. Consequently, it is open to the defendant to inquire what was the transaction between Chichester and Milton, and he is entitled to succeed, if we are of opinion that what took place between Chichester and Milton did not amount to an indorsement. Now, there may be a good indorsement without valuable consideration; but then there must be a delivery of the bill with the intention of making the person to whom it is delivered the holder of it, with power to indorse and negotiate it. The merely writing a party's name upon the bill and another person's obtaining possession of it without his privity, is not sufficient; nor is the indorsement sufficient if the bill be afterwards given to another for a collateral purpose, for which only the indorsement was made. Here, Chichester never meant to give a right to Milton to sue as indorsee, and therefore I

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think the verdict on the second issue was right. As to the third issue, I have some doubt, because there was an intention on the part of Milton to indorse and deliver the bill to the plaintiff, so as to give him a cause of action upon it; and I should say that, although it was after the bill became due, and although Milton had no just right to the bill at the time, still that must be considered as a good indorsement to the plaintiff. The verdict, therefore, ought to stand for the defendant, upon the plea that there was no indorsement from Chichester to Milton; and if the defendant will consent that upon the other plea the verdict shall be entered for the plaintiff, then the rule should be discharged.

WIGHTMAN, J. The question is, whether the evidence in this case warranted the verdict found for the defendant upon the second and third issues. By the law merchant upon the subject of the title to bills by indorsement, as expounded in the cases referred to in the argument, the plaintiff cannot make good his title to sue the acceptor through the indorsement by Chichester, who only delivered the bill to Milton for the special purpose of getting it discounted, which was not performed. And for the substantial purposes of the defence in this case, it would be sufficient to refuse the rule on that ground. I have more doubt about the effect of the indorsement from Milton to the plaintiff; but if necessary to come to a decision on that point, I should be disposed to think that the same disability would be equally applicable to that as to the other indorsement. But it may be unnecessary to decide that question, as the rule is discharged upon the point taken as to the indorsement by Chichester to Milton, and the defendant may be content to allow the verdict to be entered for the plaintiff as to the indorsement from Milton.

ERLE, J. The first question is, whether Chichester indorsed the bill to Milton. The rule of law is, that an indorsement consists not only of the handwriting of the indorser, but also of a delivery of the bill with the intention of passing the property in the bill. Now, here the delivery to Milton appears to me to have been no more than a delivery to a bailee, in order that he might use it on Chichester's behalf, the property in the bill remaining in Chichester; and I see no reason why, if Chichester wanted the bill back, he might not have demanded it of Milton, and brought trover to recover it if refused. In fact, the property in the bill never passed to Milton, and therefore there was no good indorsement to him. As to the other question, it is not now necessary to go into it. — *Rule discharged, the defendant consenting, &c.*

An indorsement is a contract, which requires, for its completion, a delivery of the bill or note. *Davis v. Lane*, 8 New Hampshire, 224. *Clark v. Sigourney*, 17 Connecticut, 511. See also *Cox v. Troy*, 5 Barn. & Ald. 474. *Brind v. Hamp-*

shire, 1 Meeson & Welsby, 365. *Ramsay v. Livingston*, 18 Martin, (Louisiana,) 13.

The indorsement and delivery must both be made by the person then having the legal interest in the note; and where a note is indorsed by a person and re-

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MARSHALL v. SHARLAND.¹

November 18, 1850.

Bankrupt — 12 & 13 Vict. c. 106, ss. 78, 86 — Affidavit of Debt — Reasonable or Probable Cause — Set-off, Necessity of deducting.

Where a creditor files an affidavit of debt under the bankruptcy consolidation act, (12 & 13 Vict. c. 106, s. 78,) he is bound to notice and deduct any sum due to the debtor arising out of the same transaction as that out of which his own debt arises, and to claim for the difference only; and if he omits to do so, he will be held not to have had reasonable or probable cause for making the affidavit in the amount at which it was made.

Where, therefore, in an action for goods sold and delivered, the plaintiff sought to recover the price of a cargo of coals, the freight of which he was bound to pay to the captain of the vessel before they could be discharged, and the defendant proved at the trial, as a set-off, payment of the freight, and reduced the verdict for the plaintiff by that amount, it was held, that the plaintiff had not any reasonable or probable cause for making an affidavit of debt in the Bankruptcy Court, for the full price of the coals, without deducting the amount paid by the defendant for freight; and the Court, under 12 & 13 Vict. c. 106, s. 86, ordered that the defendant should have the costs of the suit.

A RULE *nisi* had been obtained, on behalf of the defendant in this cause, calling upon the plaintiff to show cause why the defendant should not have his full costs of suit, notwithstanding the verdict had passed for the plaintiff, under the 12 & 13 Vict. c. 106, s. 86.

The following were the circumstances under which this question arose: On the 4th of January, 1850, a written contract was entered into by one Davies, on behalf of the plaintiff, and Bartlett, as agent for the defendant, for the sale of a cargo of coals, ex ship *Ellen*, then at Southampton, at 16s. 7d. per ton, one half to be paid on delivery, and the other half by a bill at two months, and the coals to be delivered at Redbridge, on certain terms not material to the present case. The coals had been shipped by the plaintiff on board the *Ellen*, under a charter party entered into by him, by which it was provided that

tained in his possession, and after his death is delivered by his executor to the person to whom it is indorsed, it has been held that the title to the note is not thereby transferred. *Bromage v. Lloyd*, 1 Welsby, Hurls. & Gordon, 31. *Clark v. Boyd*, 2 Hammond, (Ohio,) 56. *Clark v. Sigourney*, 17 Connecticut, 511.

Where, as in this case of *Lloyd v. Howard*, the indorsement and delivery are for a special purpose, as for the use of the indorser, or for collection, the legal interest does not vest in the indorsee, but he becomes merely an agent for the specified purpose. *Manhattan v. Reynolds*, 2 Hill, 140. *Wilson v. Holmes*, 5 Mass. 543. But where the drawer of an accepted bill wrote his name on the back, and delivered it to A. to get it discounted, who, instead thereof, deposited the bill with B., before it was due, as security for money advanced to himself, and without any fraud in B., who indorsed it to the plaintiff, the

indorsement was held good. *Palmer v. Richards*, 15 Jur. 41, reported, post. *Quere*, if this would be so, if the bill had been overdue when deposited with B.

There may be a constructive delivery, as when a bill or note is in the hands of a third person at the time of the transfer, and is afterwards held by him for the use of the indorsee. *Richardson v. Lincoln*, 5 Met. 201.

A negotiable note or bill may be assigned by delivery only, and the assignee will be entitled to the same rights, against the maker, as an indorsee, except that he cannot bring an action in his own name. *Jones v. Witter*, 13 Mass. 304. *Titcomb v. Thomas*, 5 Greenleaf, 282. But if the instrument is payable to order, the assignment, to be valid, must be made by the person having the legal interest in it. A delivery by an unauthorized person is no assignment. *Davis v. Lane*, 8 New Hampshire, 224.

¹ 20 Law J. Rep. (N. S.) Q. B. 3.

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they should be delivered at Southampton to the order of the freighters. The freight to be paid one half in cash for the ship's use during or on the discharge of the vessel, and the remaining half on the right delivery of the cargo by the freighter's acceptance at two months. On the 7th of January, the plaintiff wrote to the defendant, repudiating the contract as being beyond the authority of Davies, and also on the following day wrote to the captain of the *Ellen*, prohibiting him from discharging any part of the cargo without the plaintiff's written sanction. Davies, at the time when he sold the cargo to Bartlett, delivered to him the certificate of the ship's cargo, (which is required to be lodged at the custom-house before the cargo can be discharged,) by means of which the defendant got 340 tons delivered to him, the whole of the cargo being 362 tons, 13 cwt. 2 qrs. On the 11th of February, the plaintiff served on the defendant a notice in the form specified in schedule G, to the Bankrupt Consolidation Act, 12 & 13 Vict. c. 106, requiring the defendant to pay immediately 303*l.* 14*s.* 9*d.*, being the amount due for coals sold and delivered as per contract, and afterwards filed in the Court of Bankruptcy, under sect. 78, of the same act, an affidavit in the form specified in schedule F, stating that the defendant was justly and truly indebted to him in the sum of 303*l.* 14*s.* 9*d.* for goods sold and delivered; upon which a summons issued, and on the appearance of the defendant before the commissioner, he made a deposition according to the act, stating that he had a good defence on the merits to the demand, and also that he had paid to the captain of the *Ellen* 140*l.* for freight, in order to get the cargo discharged; whereupon the commissioner dismissed the summons without making any order as to bail.

On the 27th of May the plaintiff commenced an action for goods sold and delivered, in which he claimed to recover 303*l.* 14*s.* 9*d.*, the price of the cargo. The defendant pleaded a set-off, including, amongst other items, the sum of 140*l.*, which he alleged he had paid for freight. At the trial, before Coleridge, J., at the Winchester Summer Assizes, 1850, the jury returned a verdict for the plaintiff for 122*l.* 16*s.* 4*d.*, being the difference between the price of the 340 tons delivered to the defendant and the 140*l.* paid by him for freight.

Kinglake, Serj., and *Wise* now showed cause against the rule. This application is founded on the 12 & 13 Vict. c. 106, s. 86, and the defendant must satisfy the Court that the plaintiff, when he filed his affidavit of debt, had no reasonable or probable cause for making it in the amount therein stated. The objection is, that a cross demand of the defendant upon the plaintiff was not stated in the affidavit; but it is no part of his duty to do more than swear to the amount of the original debt due to him, and to deliver the particulars of his demand according to the form in schedule F. The rule as to set-off in bankruptcy is different from that which prevails at law: if, therefore, a creditor is to suffer if he does not state in his affidavit a cross claim which may ultimately be sustained under the fiat, it will impose great difficulty upon him. He would have to get into all legal and equitable claims.

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[ERLE, J. The plaintiff was bound to pay the freight under the charter party, and he could not proceed as for goods sold and delivered without doing so.]

[LORD CAMPBELL, C. J. The money due to the defendant seems to be rather a sum which the plaintiff was bound to pay under the contract than a cross demand.]

The plaintiff had repudiated the contract entered into by Davies, and proceeded on an implied contract raised by the delivery of the goods to the defendant. The cases decided on the 43 Geo. 3, c. 46, are very different. A party ought not to be arrested and deprived of his liberty upon an affidavit, for any thing more than the balance due from him after deducting any set-off which may be due. *Dronefield v. Archer*, 5 B. & Ald. 513. In *Smith v. Temperley*, 16 Mee. & W. 273; s. c. 16 Law J. Rep. (N. S.) Exch. 105, the Court seemed to think that under the former Bankrupt Act, 5 & 6 Vict. c. 122, the affidavit of debt was properly made without noticing a set-off. *Willding v. Temperley*, 17 Law J. Rep. (N. S.) Q. B. 184. In this particular case no hardship has been inflicted, for no step can be taken upon the affidavit except summoning the defendant to appear before the commissioner, when an investigation takes place, and the defendant's claim may be substantiated.

[LORD CAMPBELL, C. J. Surely a trader ought not to be dragged before the Bankruptcy Court, if it turns out that he has a cross demand which overtops the creditor's claim.]

[COLERIDGE, J. Reading sects. 78 and 86 together, the affidavit must be for a debt which the creditor has reasonable and probable cause to claim.]

At all events, there was here nothing to guide the plaintiff as to the amount of set-off really due. The defendant claimed more as set-off than he ultimately proved; and as to the freight, it was possible that the defendant had given security only to the captain for it. They also referred to *Russell v. Bell*, 10 Mee. & W. 340; *Sherwood v. Taylor*, 6 Bing. 280; s. c. 8 Law J. Rep. C. P. 60; and *Turner v. Prince*, 5 Ibid. 191; s. c. 7 Law J. Rep. C. P. 75.

Crowder and *Barstow*, in support of the rule. It is impossible to argue that sect. 86 is complied with if a set-off like this is omitted by the plaintiff, when he swears to the debt due. Perhaps it could not be contended that, in every possible case of a cross demand, a creditor must deduct it from the debt due to him; but in the present case, the plaintiff could have no right at all to recover for goods sold and delivered, unless he had paid, at least, half the freight, and, therefore, he must be taken to know that the defendant paid that sum under the contract, and, consequently, he should have made his affidavit for the balance only. The sole question is, whether he had reasonable and probable cause for making the affidavit in the amount of 303*l.* 14*s.* 9*d.*, and it is plain that he had not.

LORD CAMPBELL, C. J. I am called upon here to say, whether it has been shown that the plaintiff had not reasonable and probable

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cause for making an affidavit of debt in the amount at which it was made, and I must say that I am satisfied he had not. I lay down no rule that in all cases a set-off must necessarily be noticed. But if there be a clear set-off which the creditor knows to exist, and which must be deducted from his demand when he states its amount, or when he proves for his debt, such a sum ought to be deducted in his affidavit, otherwise he has no reasonable or probable cause for swearing to the amount there stated. I think that the decisions on the 43 Geo. 3, c. 46, are very reasonable, and clearly in point. According to them, it was considered that an arrest for the full amount of a debt, without giving credit for a set-off, would be an arrest without reasonable and probable cause. Now, with regard to the consequences which might ensue from such a proceeding under the present act, this affidavit is made with the view of stripping a trader of every thing, and dividing it among his creditors; and I think it was not intended to give such a power to a creditor, unless he stated the sum which he would be really entitled to recover in an action, or to prove under the bankruptcy. The 78th section of the 12 & 13 Vict. c. 106, provides that the creditor shall file an affidavit of the *truth* of his debt; and he cannot, in my opinion, do that if he swears to only one side of the account. The true debt is, what is really due to him, and what he can recover. The form in the schedule G is relied upon as assisting the plaintiff's view; but it requires the particulars of the demand to be stated, and adds, "Take notice that I, the said A, require *immediate* payment of the said sum:" that must be the sum which he conscientiously believes he is entitled to, and which cannot be the case if there is a cross demand which overtops his debt. If the commissioner does his duty, he may protect the debtor from the consequences of such an affidavit as this; but still the debtor is by it exposed to risk. I think such a stringent remedy should only be put in force with great caution. Now, on these facts, there seems no doubt that the set-off was due, and that the plaintiff well knew that 140%, or at all events 70%, ought to have been paid by him, and was, therefore, due from him to the defendant. But notwithstanding this, he makes an affidavit for the full price of the goods. Such an affidavit is, therefore, made without reasonable or probable cause, as it ought to have allowed for the set-off.

COLERIDGE, J. The question rests on the right construction to be given to section 86 of the Bankruptcy Consolidation Act. Does it appear by the affidavits that the plaintiff had reasonable or probable cause for making this affidavit in the amount at which it was sworn? In the first place, he states it to be a debt for goods sold and delivered, it being quite clear that he knew at the time that the goods had passed out of the possession of the captain to the defendant by virtue of some contract. Can he doubt, then, that the captain received the freight from the defendant; and that if he claims to receive any thing at all for goods delivered, he must have paid half the freight? Therefore he must be aware that there was a sum to be deducted from his claim, and he could not conscientiously sue for the price as a debt without making that deduction.

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WIGHTMAN, J. On the question of reasonable or probable cause, it is not necessary—indeed, it is hardly possible—to lay down any rule which will govern all cases. The question must arise on the facts of the particular case. Had the plaintiff any reasonable or probable cause, in this instance, for making this affidavit of debt, and entailing on the defendant the consequences which would have resulted if that claim had been well founded? He himself treats the claim as for goods sold and delivered, and he must have known that such could not be the case unless he had himself paid at least half of the freight. It does happen, in this case, that the sum claimed as a set-off arises out of the very matter of the contract, and, therefore, it seems to me, that it is a case in which, *a fortiori*, it should be deducted from the amount of the debt due under the contract in stating the particulars of the demand. It is an item on the debtor side of the account. I think, therefore, the plaintiff had no reasonable or probable cause for making this affidavit, and that the defendant should have the costs of the suit.

ERLE, J. I think that this rule should be made absolute. Where that which is claimed as a set-off is part of the transaction out of which the debt arises, the party making an affidavit of debt ought to give credit for the set-off. Here the defendant got the goods only by paying the freight under the contract. And, although the plaintiff says that the contract was entered into against his will, still, by suing for goods sold and delivered, he treats them as lawfully obtained by the defendant, and therefore by payment of the freight due under the contract. Therefore, that which is technically a set-off is to be deducted from the sum claimed by the plaintiff as the price of the goods. I should carry this principle out in all cases where there are mutual debts between the parties, and where the one party seeks to make the other a bankrupt without giving credit for the cross demand. In *Willding v. Temperley*, what I said was, that if the matter of the set-off is quite unconnected with the debt claimed, it need not be stated in detail. The creditor may well say that this demand is subject to a set-off to some amount. If, however, it arises out of the same matter as the debt, it is proper that he should state the exact amount of set-off. Certainly it would be the prudent course to say, after deducting the set-off, the sum claimed is so and so. Here the defendant was clearly entitled to have this deduction made out of the very transaction in respect of which the plaintiff founds his claim.—*Rule absolute.*

 Bainbridge v. Wade.

BAINBRIDGE v. WADE.¹

November 12, 13, 1850.

Written Guarantee — Construction — Sufficiency of Consideration — Parol Evidence to explain.

A declaration in assumpsit, after alleging that A. L. had requested the plaintiff to sell him goods upon credit, and that the plaintiff had agreed to do so, provided the defendant would guarantee the price of the said goods; further stated, that before the said A. L. was indebted to the plaintiff for any goods or chattels, and at a time when no goods delivered by the plaintiff to A. L. on credit remained on credit, and when no money was due to the plaintiff from A. L., the defendant signed the following guarantee: "I hereby guarantee the payment of any sum or sums of money due to you from Mr. Andrew Little, of Richmond, the amount not to exceed at any time the sum of 100*l*." The declaration then alleged the subsequent sale and delivery to A. L. of divers goods and chattels upon credit, to the amount of 100*l*.; and that although the time of credit and for payment had elapsed, and A. L. had not paid the amount when requested, of all which the defendant had notice, yet the defendant had not paid the said amount, &c. : —

Held, upon demurrer, that a future supply of goods sufficiently appeared, from the terms of the guarantee itself, to be the consideration of the defendant's promise; and that, at all events, supposing the terms of the guarantee to apply equally to a past as to a future consideration, evidence of the circumstances of the parties at the time when the guarantee was made, was admissible to explain its meaning; and that they, as appeared from the declaration, showed that a future consideration was meant.

ASSUMPSIT. The declaration stated that A. L., the person mentioned in the written promise thereafter set forth, had requested "the plaintiff to sell and deliver to him goods and chattels in the way of his, the plaintiff's, business of a woollen-draper, on credit; and the plaintiff had, at the request of the said A. L., agreed and consented to do so, provided the defendant would guarantee the payment of the price of the said goods so to be sold and delivered to the said A. L., as aforesaid, of which the defendant before and at the time of the making of the promise had notice; and thereupon afterwards and before the said A. L. was indebted to the plaintiff for any goods or chattels, and at a time when no goods or chattels delivered by the plaintiff to the said A. L. on credit remained on credit or unpaid for, and when no money was due from the said A. L. to the plaintiff, on any account whatever, to wit, on the day and year aforesaid, by a certain promise in writing, signed by the defendant, and addressed in writing to the plaintiff, who was therein designated by the letters and words Mr. G. P. Bainbridge, he, the defendant, addressed and promised the plaintiff, in the words, letters and figures following, that is to say, —

"York, February 6, 1843.

"To Mr. G. P. Bainbridge.

"Sir: I hereby guarantee the payment of any sum or sums of money due to you from Mr. Andrew Little, of Richmond, the amount not to exceed, at any time, the sum of one hundred pounds.

"JOSEPH WADE."

And the plaintiff avers that he, confiding in the said promise of the defendant, did afterward, and before the commencement of this suit,

¹ 20 Law J Rep. (N. S.) Q. B. 7.

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to wit, &c., supply, sell, and deliver to the said A. L. divers goods and chattels of great value, to wit, of the value of 100*l.*, in the way of his, the plaintiff's, said trade, and business, upon credit, and for certain reasonable prices and sums of money in that behalf, to wit, to the said sum of 100*l.*, and did thereby allow the said A. L. to become indebted to the plaintiff to the amount of the said sum of 100*l.*; and although the said credit and the time for the payment for the said goods and chattels had elapsed, and although the said A. L. was requested by the plaintiff to pay him the said sum of money, yet he did not pay the same or any part thereof, of all which premises the defendant had notice; yet the defendant had not paid the said sum so due from the said A. L., being a sum not exceeding 100*l.*, although requested so to do, but the same still remained due, to the plaintiff's damage, &c.

Demurrer and joinder in demurrer. The material points were, that the declaration did not state any consideration for the alleged promise of the defendant; and that the guarantee did not appear upon the face of it to be made for any consideration moving from the plaintiff to the defendant; and that the declaration was uncertain in not stating the legal effect of the promise, and the consideration upon which the defendant made the same.

Pashley, in support of the demurrer. Various constructions as to the consideration for the defendant's promise may be put upon this guarantee. It does not appear, by any reasonable intendment, that the only consideration was a future supply of goods, and therefore the declaration is bad. *Jenkins v. Reynolds*, 3 B. & B. 14. *Price v. Richardson*, 15 Mee. & W. 539; s. c. 15 Law J. Rep. (n. s.) Exch. 345. *Hawes v. Armstrong*, 1 Bing. N. C. 761; s. c. 4 Law J. Rep. (n. s.) C. P. 254. *Raikes v. Todd*, 8 Ad. & E. 846; s. c. 8 Law J. Rep. (n. s.) Q. B. 35. The case of *Kennaway v. Treleavan*, 5 Mee. & W. 498; s. c. 9 Law J. Rep. (n. s.) Exch. 20, went further than the former cases; but even upon the decision in that case, the present objection is well founded. The subsequent case of *Goldshede v. Swan*, 1 Exch. Rep. 154; s. c. 16 Law J. Rep. (n. s.) Exch. 284, is very different in its circumstances from this case; and to admit parol evidence here, as was done in that case, to show that a future consideration was meant, would, in truth, be, not to explain the guarantee, but to show otherwise what the contract was; and thus the authority of all the previous cases would be broken in upon.

Rew, contra. If the guarantee were given under the circumstances alleged in the declaration, it is valid, and it would be open to the plaintiff to prove those circumstances at the trial. The earlier cases referred to turned upon the question of variance as to the consideration between the declaration and the guarantee. But this case is clear of any such question, for the declaration is general, and puts no particular construction upon the guarantee. The case of *Edwards v. Jevons*, 19 Law J. Rep. (n. s.) C. P. 50, is a strong authority in support of the guarantee. There the circumstances under which the guarantee was given were fully gone into and considered, in order to

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show that the consideration was a future one, the terms of the guarantee being ambiguous. The case of *Lysaght v. Walker*, 5 Bligh, N. S. 1, is very like the present case.

[LORD CAMPBELL, C. J., referred to *Stadt v. Lill*, 9 East, 348.]

That case, too, resembles very much the present, and in both the guarantee was held good. He referred also to *Jarvis v. Wilkins*, 7 Mee. & W. 410; s. c. 10 Law J. Rep. (N. S.) Exch. 104; *Russell v. Moseley*, 3 B. & B. 211; *Newberry v. Armstrong*, 6 Bing. 201; s. c. 8 Law J. Rep. C. P. 4; *Steele v. Hoe*, 19 Law J. Rep. (N. S.) Q. B. 89; and *Butcher v. Stewart*, 11 Mee. & W. 857; s. c. 12 Law J. Rep. (N. S.) Exch. 391.

Pashley, in reply. In *Cole v. Dyer*, 1 Cr. & J. 161; s. c. 9 Law J. Rep. Exch. 109, Lord Lyndhurst lays it down that a guarantee, from which two considerations may with equal propriety be inferred, is not valid. The case of *James v. Williams*, 5 B. & Ad. 1109; s. c. 3 Law J. Rep. (N. S.) K. B. 97, decides that the consideration must either be in express words, or be implied with certainty from the terms used; and the same principle is acted upon in *Bushell v. Beavan*, 1 Bing. N. C. 103; s. c. 3 Law J. Rep. (N. S.) C. P. 279, and stated as the result of the authorities in 1 Wms. Saund. 211, note d, and 1 Taylor on Evidence, 648.

[LORD CAMPBELL, C. J. We are all agreed as to that.]

Then, as to the admissibility of evidence to show the intention of the party; it can hardly be said that the party had any intention to satisfy the Statute of Frauds. He intended simply to make a promise. All the cases relied upon to show that the guarantee may be explained are distinguishable from the present, and in most of them the guarantee itself showed a good consideration.

LORD CAMPBELL, C. J. Looking to the principle of law and the decisions applicable to this case, I have no doubt that the plaintiff is entitled to our judgment. The question here is not, as in *Raikes v. Todd*, and that class of cases, whether the consideration alleged in the declaration is proved by the written guarantee. This is the case of a demurrer to a declaration which sets out the written guarantee in words and figures, and the Court is to see whether that instrument does sufficiently contain the consideration for the alleged promise. If it does not, then undoubtedly it is void; but if, on the face of the instrument, we can see with reasonable certainty what the consideration for the promise was, that is sufficient. The early case of *Wain v. Walters*, 5 East, 10, on this subject, was followed by *Stadt v. Lill*, the decision in which was not meant to shake the authority of *Wain v. Walters*; and what, in effect, is said in *Stadt v. Lill* is, that it is enough if from the instrument itself it can be gathered what the consideration was. Now, taking into consideration the facts alleged in the declaration in this case, we can readily and without doubt see what the real consideration was. That parol evidence to explain a written contract cannot be given, is, I agree, no longer open to argu-

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ment, and the Chief Baron's observations in *Goldshede v. Swan* must be taken as applicable to the particular case then under consideration. But evidence may be received of the circumstances of the party at the time when the instrument was framed, in order to show in what sense the instrument was made. That is the ground of the decisions in *Haigh v. Brooks*, 10 Ad. & E. 309; s. c. 9 Law J. Rep. (n. s.) Q. B. 99; *Goldshede v. Swan*, and *Edwards v. Jevons*; and I think those cases are well decided, being in exact analogy with what is always done in cases of the construction of wills. As, then, those cases establish that evidence may be given of the circumstances under which the guarantee was given, let us see what are the facts here. [His Lordship read the guarantee.] This instrument may be construed to apply only to a future debt: I should say that is its natural construction. But when we find that the defendant knew very well that Little had had no dealings with the plaintiff, what other construction can be put upon it, but that, if credit was given to Little, the defendant would be liable to the extent of 100l.? A future dealing was clearly contemplated. It is quite unnecessary to travel through all the cases on this subject. What they establish is, that the consideration must appear upon the face of the instrument with reasonable certainty, and that abundantly appears from the declaration in this case, which does not, very properly I think, put any precise construction upon the instrument.

COLERIDGE. J. This case stands upon principles and rules of law which cannot well be disputed, and the defendant's counsel, in his argument, might have saved himself a good deal of trouble. The case of *Wain v. Walters* and the subsequent cases, put together, clearly establish that the consideration must appear upon the face of the document in express terms or by necessary inference, which means that it is not to be left to mere conjecture, nor supplied by any parol evidence. But there is also another rule of law equally clear, that you may apply any of the means allowed by law, in order to ascertain the meaning of the written instrument; and one of those is, that in seeking to construe a written document you are to look to the circumstances of the party, at the time when the document was executed, and until you have done that fully, you cannot say that the language used is ambiguous. Very often the writer of the document makes use of a participle or tense which is intended to mean the future, but which may in strictness denote the past time. Therefore, we must look first to the context of the instrument, and if that is not enough to show the meaning, then we must look to the circumstances attending the party at the time of his writing the document. Here I should have said, that the context was enough to show, that in the language of ordinary life a future credit to the amount of 100l. was meant. But, supposing that were not so, I think the circumstances alleged in the declaration, and which must now be taken to be admitted, may be looked to; and they clearly show a future intention. Judgment, therefore, must be for the plaintiff.

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WIGHTMAN, J. I am of the same opinion. No doubt the consideration must appear upon the face of the instrument either in direct terms or by necessary implication. In a great number of the cases, the question has been one of variance between the instrument and the construction put upon it in the declaration; but here the instrument itself is set out in express terms in the declaration. Then, it is said that the terms of the instrument are, at least, doubtful, and may equally apply to a past as to a future debt. I cannot so read the instrument itself. The words, "the amount not to exceed at any one time 100 $\frac{1}{2}$," are altogether inapplicable to a past debt. I therefore think it unnecessary to consider further the rule that has been referred to, as to the admission of parol evidence to explain the written document, although I agree with the rest of the Court in the opinion that has been expressed.

ERLE, J. I think the plaintiff is clearly entitled to our judgment. According to the decision in *Goldshede v. Swan*, the plaintiff would have been entitled to show, that at the time of giving the guarantee nothing was due from Andrew Little; and, therefore, that the consideration really meant was, money afterwards to become due; the terms of the guarantee admitting, I think, of that construction, even without the latter words limiting the amount. The rule of law, as stated at page 83 of *Wigram on Wills*, applies to this case. I believe no written instrument can be produced, which, if looked at without any reference at all to the circumstances under which it was given, may not be capable of several readings. I think those circumstances are admissible; and if they so explain the document as to make it valid, it ought to be upheld. — *Judgment for the plaintiff.*

The rule laid down in *Wain v. Walters*, 5 East, cited by the chief justice in this case, and followed in later English authorities requiring the *consideration* for which one promises to pay the debt of another, to be also in writing under the statute of frauds, has not been generally adopted in this country. In some States, however, either from an *express* statutory provision, or otherwise, it is held that the considera-

tion must either be distinctly expressed, or be capable of being gathered from the instrument. See *Neelson v. Sandborne*, 2 New Hampshire, 414. *Newcomb v. Clark*, 1 Denio, 226. *D'Wolf v. Rabaud*, 1 Peters, 476. *Buckley v. Beardslee*, 2 Southard, 570. *Elliot v. Giese*, 7 Harris & Johnson, 457. *Stephens v. Winn*, 3 Brevard, 17.

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HUMPHRIES v. BROGDEN,¹ Secretary, &c.

November 21, 1850.

Mining — Easement — Right of Owner of Surface to Support of subjacent Strata — Working Mines — Pleading.

When the surface of land belongs to one man, and the minerals belong to another, no evidence of title appearing to regulate or qualify their rights of enjoyment, the owner of the minerals cannot remove them without leaving support sufficient to maintain the surface in its natural state. The owner of the surface close, while unincumbered by buildings and in its natural state, is entitled to have it supported by the subjacent mineral strata; and if the surface subsides and is injured by the removal of these strata, although the operation of removal may not have been conducted negligently nor contrary to the custom of the country, the owner of the surface may maintain an action against the owner of the minerals for the damage sustained by the subsidence.

A declaration alleging that the defendant wrongfully and improperly, and without leaving any proper or sufficient pillars or supports in that behalf, worked certain coal mines under and contiguous to the close of the plaintiff, and dug for and got and moved the coals, minerals, earth, and soil of and in the said mines, and that by reason thereof the soil and surface of the said close sank in, cracked, swagged, and gave way, is sufficient, without an express allegation that the plaintiff was entitled to have his close supported by the subjacent strata.

CASE for injury to the plaintiff's close, by working the mines below it.

Plea, not guilty.

The cause was tried, before Coleridge, J., at the Durham Spring Assizes, 1849, when a verdict was entered for the plaintiff, with 110*l.* damages, leave being reserved to the defendant to move to enter a verdict, if, under the circumstances, the action could not be maintained.

A rule *nisi* was accordingly obtained, and was, in Trinity term, May 23, 24, before Lord Campbell, C. J., Patteson, J., Coleridge, J., and Erle, J., argued by

Watson and *J. Addison*, for the plaintiff, and by

Knowles and *H. Hill*, for the defendants.

The pleadings and facts of the case, as well as the arguments, are so fully stated in the judgment delivered by the Court, that it is unnecessary to repeat them here. — *Cur. adv. vult.*

Judgment was now delivered by

LORD CAMPBELL, C. J. This is an action on the case. The declaration alleges that "the plaintiff was possessed of divers closes of pasture and arable land, situate, &c., yet that the company wrongfully, *carelessly, negligently*, and improperly, and without leaving any proper or sufficient pillars or supports in that behalf, and *contrary to the custom and course of practice of mining used and approved of in the country where the mines thereafter mentioned are situate*,

¹ 20 Law J. Rep. (N. S.) Q. B. 10. 15 Jur. 124.

worked certain coal mines under and contiguous to the said closes, and dug for and got and moved the coals, minerals, earth, and soil of and in the said mines; that by reason thereof, the soil and surface of the said closes sank in, cracked, swagged, and gave way, and thereby," &c. The only material plea was not guilty. The cause coming on to be tried before my brother Coleridge, at the Spring Assizes for the county of Durham, 1849, it appeared that the plaintiff was possessed of the closes described in the declaration, and that the Durham County Coal Company (who may sue and be sued by their secretary) were lessees under the Bishop of Durham of the coal mines under them, but there was no other evidence whatever as to the tenure or the title either of the surface or of the minerals. It appeared that the company had taken the coals under the plaintiff's closes, without leaving any sufficient pillars to support the surface, whereby the closes had swagged and sunk, and had been considerably injured, but that, supposing the surface and the minerals to have belonged to the same person, these operations had not been conducted carelessly or negligently, or contrary to the custom of the country. The jury found that "the company had worked carefully and according to the custom of the country, but without leaving sufficient pillars or supports," and a verdict was entered for the plaintiff for 110*l.* damages, with leave to move to enter a verdict for the defendants, if the Court should be of opinion that, under these circumstances, the action was not maintainable.

The case was very learnedly and ably argued before us in Easter and Trinity terms last. On account of the great importance of the question, we have taken time to consider of our judgment. For the defendants, it was contended that, after the special finding of the jury, the declaration is defective in not alleging that the plaintiff was entitled to have his closes supported by the subjacent strata. But we are of opinion that such an allegation is unnecessary to raise the question in this action, whether the company, although they did not work the mines negligently or contrary to the custom of the country, were bound to leave props to support the surface. If the easement, which the plaintiff claims, exist, it does not arise from any special grant or reservation, but is of common right, created by the law, so that we are bound to take notice of its existence. In pleading, it is enough to state the facts from which a right or a duty arises. The carefully prepared declaration in *Littledale v. Lord Lonsdale*, 2 H. Black. 267, for disturbing the right of the owner of the surface of lands to the support of the mineral strata belonging to another, contains no express allegation of the right; and if the omission had been considered important, it probably would have been relied upon rather than the objection, that a peer of Parliament was not liable to be sued in the Court of King's Bench by bill.

We have, therefore, to consider whether, when the surface of land (by which is here meant the soil lying over the minerals) belongs to one man, and the minerals belong to another, no evidence of title appearing to regulate or qualify their rights of enjoyment, the owner of the minerals may remove them without leaving support sufficient to

maintain the surface in its natural state. This case is entirely relieved from the consideration how far the rights and liabilities of the owners of adjoining tenements are affected by the erection of *buildings*; for the plaintiff claims no greater degree of support for his lands than they must have required and enjoyed since the globe subsisted in its present form. Where portions of the freehold lying one over another perpendicularly belong to different individuals, and constitute (as it were) separate closes, the degree of support to which the upper is entitled from the lower has as yet by no means been distinctly defined. But, in the case of abjoining closes which belong respectively to different persons from the surface to the centre of the earth, the law of England has long settled the degree of lateral support which each may claim from the other; and the principle upon which this rests may guide us to a safe solution of the question now before us.

In 2 Rol. Abr. Trespass, (1) pl. 1, p. 564, it is said, "If A, seized in fee of copyhold next adjoining land of B, erect a new house on his copyhold land," (I may remark, that the circumstance of A's land being copyhold is wholly immaterial,) "and part of the house is erected on the confines of his land next adjoining the land of B, if B afterwards digs his land near to the foundation of the house of A, but not touching the land of A, whereby the foundation of the house and the house itself fall into the pit, still no action lies at the suit of A against B, because this was the fault of A himself that he built his house so near to the land of B, for he could not by his act hinder B from making the most profitable use of B's own land. 15 Car. 1. B. R., *Wilde v. Minsterly*. But, *semble*, that a man who has land next adjoining to my land cannot dig his land so near to my land that thereby my land shall fall into his pit; and for this, if an action were brought, it would lie."

This doctrine is recognized by Lord C. B. Comyns, Dig. Action on the Case for a Nuisance, (A); by Lord Tenterden in *Wyatt v. Harrison*, 3 B. & Ad. 871; s. c. 1 Law J. Rep. (N. S.) K. B. 237; and by other eminent Judges. It stands on natural justice, and is essential to the protection and enjoyment of property in the soil. Although it places a restraint on what a man may do with his own property, it is in accordance with the precept, *Sic utere tuo, ut alienum non lædas*. As is well observed by a modern writer, "If the neighboring owners might excavate their soil on every side up to their boundary line to an indefinite depth, land thus deprived of support on all sides could not stand by its own coherence alone." Gale on Easements, p. 216. This right to lateral support from the adjoining soil is not, like the support of one building upon another, supposed to be gained by grant, but is a right of property passing with the soil. If the owner of two adjoining closes conveys away one of them, the alienee, without any grant for that purpose, is entitled to the lateral support of the other close, the very instant when the conveyance is executed, as much as after the expiration of twenty years, or any longer period.

Pari ratione, where there are separate freeholds, from the surface of the land and the minerals belonging to different owners. we are of

opinion that the owner of the surface, while unincumbered by buildings and in its natural state, is entitled to have it supported by the subjacent mineral strata. Those strata may, of course, be removed by the owner of them, so that a sufficient support for the surface is left; but if the surface subsides and is injured by the removal of those strata, although (on the supposition that the surface and the minerals belong to the same owner) the operation may not have been conducted negligently, nor contrary to the custom of the country, the owner of the surface may maintain an action against the owner of the minerals for the damage sustained by the subsidence. Unless the surface-close be entitled to this support from the close underneath, corresponding to the lateral support to which it is entitled from the adjoining surface-close, it cannot be securely enjoyed as property, and, under certain circumstances, as where the mineral strata approach the surface and are of great thickness, it might be entirely destroyed. We likewise think that the rule giving the right of support to the surface upon the minerals, in the absence of any express grant, reservation, or covenant, must be laid down generally, without reference to the nature of the strata or the difficulty of propping up the surface, or the comparative value of the surface and the minerals. We are not aware of any principle upon which qualifications could be added to the rule, and the attempt to introduce them would lead to uncertainty and litigation. Greater inconvenience cannot arise from this rule in any case, than that which may be experienced where the surface belongs to one owner and the minerals to another, who cannot take any portion of them, without the consent of the owner of the surface. In such cases, a hope of reciprocal advantage will bring about a compromise advantageous to the parties and to the public. Something has been said of a right of *reasonable* support for the surface, but we cannot measure out degrees to which the right may extend, and the only reasonable support is that which will protect the surface from subsidence, and keep it securely at its ancient and natural level.

The defendant's counsel have argued that the analogy as to the support to which one superficial close is entitled from the adjoining superficial close, cannot apply where the surface and the minerals are separate tenements belonging to different owners, because there must have been unity of title of the surface and the minerals, and the rights of the parties must depend upon the contents of the deeds by which they were severed. But in contemplation of law, all property in land having been in the Crown, it is easy to conceive that at the same time the original grant of the surface was made to one, and of the minerals under it to another, without an express grant or reservation of any easement. Suppose (what has generally been the fact) that there has been in a subject unity of title from the surface to the centre; if the surface and the minerals are vested in different owners without any deeds appearing to regulate their respective rights, we see no difficulty in presuming that the severance took place in a manner which would confer upon the owner of the surface a right to the support of the minerals. If the owner of the entirety is supposed

to have alienated the surface, reserving the minerals, he cannot be presumed to have reserved to himself, in derogation of his grant, the power of removing all the minerals without leaving a support for the surface; and if he is supposed to have alienated the minerals, reserving the surface, he cannot be presumed to have parted with the right to that support for the surface by the minerals which it had ever before enjoyed. Perhaps it may be said, that if the grantor of the minerals, reserving the surface, seeks to limit the right of the grantee to remove them, he is acting in derogation of his grant, and is seeking to hinder the grantee from doing what he likes with his own; but, generally speaking, mines may be profitably worked, leaving a support to the surface by pillars or ribs of the minerals, although not so profitably as if the whole of the minerals be removed; and a man must so use his own as not to injure his neighbor. The books of reports abound with decisions restraining a man's acts upon and with his own property, where the necessary or probable consequence of such acts is to do damage to others.

The case of common occurrence nearest to the present is, where the upper story of a house belongs to one man and the lower to another. The owner of the upper story, without any express grant, or enjoyment for any given time, has a right to the support of the lower story. If this arises (as has been said) from an implied grant or covenant, why is not a similar grant or covenant to be implied in favor of the owner of the surface of land against the owner of the minerals? If the owner of an entire house conveying away the lower story only, is, without any express reservation, entitled to the support of the lower story for the benefit of the upper story, why should not an owner of land who conveys away the minerals only, be entitled to the support of the minerals for the benefit of the surface?

I will now refer, in chronological order, to the cases which were cited in the argument; and I think that none of them will be found in any degree to impugn the doctrine on which our decision rests. In *Bateson v. Green*, 5 Term Rep. 411, Buller, J., says, "Where there are two distinct rights claimed by different parties, which encroach on each other in the enjoyment of them, the question is, Which of the two rights is subservient to the other?" And it was held, that the lord may dig clay pits on a common, or empower others to do so, without leaving sufficient herbage for the commoners, if such right can be proved to have been always exercised by the lord. So here, the right of the owner of the minerals to remove them may be subservient to the right of the owner of the surface to have it supported by them. *Peyton v. The Mayor, &c., of London*, 9 B. & C. 725; s. c. 7 Law J. Rep. K. B. 322, was cited to show the necessity for introducing into the declaration an averment, that the plaintiff was entitled to the easement or right which is the foundation of the action; but the easement there claimed was a right of support of one *building* upon another, which could only arise from a grant actual or implied; and there Lord Tenterden says, "The declaration in this case does not allege as a fact that the plaintiffs were entitled to have

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their house supported by the defendant's house, nor does it, in our opinion, contain any allegation from which a title to such support can be inferred as matter of law." In the case at bar, we are of opinion that the declaration alleges facts from which the law infers the right to support which the plaintiff claims. *Wyatt v. Harrison* decided that the owner of a house recently erected on the extremity of his land could not maintain an action against the owner of the adjoining land for digging in his own land so near to the plaintiff's house that the house fell down; but the reason given is, that the plaintiff could not, by putting an additional weight upon his land, and so increasing the lateral pressure upon the defendant's land, render unlawful any operation in the defendant's land which before would have caused no damage; and the Court intimated an opinion that the action would have been maintainable not only if the defendant's digging would have made the plaintiff's land crumble down unloaded by any building, but even if the house had stood twenty years. Where a house has been supported more than twenty years by land belonging to another proprietor, with his knowledge, and he digs near the foundation of the house, whereby it falls, he is liable to an action at the suit of the owner of the house. *Stansell v. Jollard*, 1 Selw. N. P. 444, and *Hide v. Thornborough*, 2 Car. & K. 250. Although there may be some difficulty in discovering whence the grant of the easement in respect of the house is to be presumed, as the owner of the adjoining land cannot prevent its being built, and may not be able to disturb the enjoyment of it without the most serious loss or inconvenience to himself, the law favors the preservation of enjoyments acquired by the labor of one man and acquiesced in by another who has the power to interrupt them; and as, on the supposition of a grant, the right to light may be gained from not erecting a wall to obstruct it, the right to support for a new building erected near the extremity of the owner's land may be explained on the same principle. In *Dodd v. Holme*, 1 Ad. & E. 493, where there was a good deal of discussion respecting the rights of owners of adjoining lands or houses, no point of law was determined, as the case turned upon the allegation in the declaration, that "the defendant dug carelessly, negligently, unskilfully, and improperly, whereby the foundation and the walls of the plaintiff's house gave way." The plaintiff's house was proved to have been in a very bad condition; but Lord Denman said that the defendant had no right to accelerate its fall.

The Court of Exchequer, in *Partridge v. Scott*, 3 Mee. & W. 220; s. c. 7 Law J. Rep. (n. s.) Exch. 101, concurred in the law before laid down in this Court, that a right to the support of the foundation of a house from adjoining land belonging to another proprietor, can only be acquired by grant, and that where the house was built on excavated land, a grant is not to be presumed till the house has stood twenty years after notice of the excavation to the person supposed to have made the grant; but nothing fell from any of the Judges questioning the right to support which land, while it remains in its natural state, has been said to be entitled to from the adjoining land of another proprietor. Some land of the plaintiff's not covered with

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buildings had likewise sunk, in consequence of the defendant's operations in his own land; but the Court, in directing a verdict to be entered for the defendant on the whole declaration, seems to have thought that the sinking of the plaintiff's land was consequential upon the fall of the houses, or would not have taken place if his own land had not been excavated. The Judges in the Exchequer Chamber held, upon a writ of error from the Court of Common Pleas, in *Chadwick v. Trower*, 6 Bing. N. C. 1; s. c. 8 Law J. Rep. (N. S.) Exch. 286, that the mere circumstance of juxtaposition does not render it necessary for a person who pulls down his wall to give notice of his intention to the owner of an adjoining wall which rests upon it, and that he is not even liable for carelessly pulling down his wall, if he had not notice of the existence of the adjoining wall; but this decision proceeds upon the want of any allegation or proof of a right of the plaintiff to have his wall supported by the defendant's, and does not touch the rights or obligations of conterminous proprietors, where the tenement to be supported remains in its natural condition.

Next comes the valuable case of *Harris v. Ryding*, 5 Mee. & W. 60; s. c. 8 Law J. Rep. (N. S.) Exch. 181, which would be a direct authority in favor of the present plaintiff, if it did not leave some uncertainty as to the effect of the averment in the declaration of working "carelessly, negligently, and improperly," and as to whether the plaintiff was considered absolutely entitled to have his land supported by the subjacent strata, to whatever degree the affording of this support might interfere with the defendant's right to work the minerals. There, one seized in fee of land conveyed away the surface, reserving to himself the minerals, with power to enter upon the surface to work them; and it is said to have been held that, under this reservation, he was not entitled to take all the minerals, "but only so much as he could get, leaving a reasonable support to the surface." The case was decided upon a demurrer to certain pleas justifying under the reservation, and the declaration alleged "careless, negligent, and improper working," which there must be considered as admitted, whereas here it is negatived by the verdict; but the Barons, in the very comprehensive and masterly judgments which they delivered *seriatim*, seem all to have thought that the reservation of the minerals would not have justified the defendant in depriving the surface of a complete support, however carefully he might have proceeded in removing them. Lord Abinger says, "The plea is no answer, because it does not set forth any sufficient ground to justify the defendant in working the mines in such a manner as not to leave sufficient support for the land above, which is alleged by the declaration to be a careless, negligent, and improper mode of working them." Parke, B., observes, "It never could have been in the contemplation of the parties, that by virtue of this reservation of the mines, the grantor should be entitled to take the whole of the coal, and let down the surface, or injure the enjoyment of it. The plea is clearly bad, because the defendants do not assign that in taking away the coal they did leave a sufficient support for the surface in its then

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state." "The question is," says Alderson, B., "whether the grantor is not to get the minerals which belong to him, and which he has reserved to himself the right of getting in that reasonable and ordinary mode in which he would be authorized to get them, provided he leaves a proper support for the land which the other party is to enjoy."

My brother Maule, then a Judge of the Court of Exchequer, says, in the course of his luminous judgment, "The right of the defendant to get the mines is the right of the mine owners, as against the owner of the land which is above it. That right appears to me to be very analogous to that of a person having a room in a house over another man's room, or an acre of land adjoining another man's acre of land." Parke, B., that he might not be misunderstood as to the right of the owner of the surface, afterwards adds, "I do not mean to say that all the coal does not belong to the defendants, but *that they cannot get it, without leaving sufficient support.*" It seems to have been the unanimous opinion of the Court, that there existed the natural easement of support for the upper soil from the soil beneath; and that the entire removal of the inferior strata, however skilfully done, would be actionable, if productive of damage by withdrawing that degree of support to which the owner of the surface was entitled, the duty of the owner of the servient tenement forbidding him to do any act whereby the enjoyment of the easement could be disturbed. The counsel for the defendants cited and relied much upon the case of *Acton v. Blundell*, 12 Mee. & W. 324; s. c. 13 Law J. Rep. (N. S.) Exch. 289, in which it was held that a land owner, who, by mining operations in his own land, diverts a subterraneous current of water, is not liable to an action at the suit of the owner of adjoining land, whose well is thereby laid dry; but the right to running water, and the right to have land supported, are so totally distinct, and depend upon such different principles, that there can be no occasion to show at greater length how the decision is inapplicable. I have now to mention the case of *Hilton v. Earl Granville*, 5 Q. B. Rep. 701; s. c. 13 Law J. Rep. (N. S.) Q. B. 193. A writ of error may probably be brought in this case when all the issues of fact have been disposed of, and nothing which I now say is to preclude me from forming any opinion upon it, should I ever hear it argued. If well decided, the plaintiff is justified in relying upon it, for it is strongly in point. This Court there held that a prescription or a custom within a manor for the lord, who is seized in fee of the mines and collieries therein, to work them under any dwelling-houses, buildings, and lands, parcels of the manor, doing no unnecessary damage, and paying to the tenants and occupiers of the surface of land damaged thereby a reasonable compensation for the use of the surface of the land, *but without making compensation for any damage occasioned to any dwelling-houses or other buildings within or parcel of the manor, by or for the purpose of working the said mines and collieries*, is void, as being unreasonable. Lord Denman said, "A claim destructive of the subject matter of the grant cannot be set up by any usage. Even if the grant could be produced *in specie*, reserving a

right in the lord to deprive his grantee of the enjoyment of the thing granted, such a clause must be rejected, as repugnant and absurd. That the prescription or custom here pleaded has this destructive effect, and is so repugnant and void, appears to us too clear, from the simple statement, to admit of illustration by argument." The most recent case referred to was *Smith v. Kenrick*, 7 Com. B. Rep. 515; s. c. 18 Law J. Rep. (N. S.) C. P. 172, in which the Court of Common Pleas, after great deliberation, held, that it is the right of each of the owners of the adjoining mines, where neither mine is subject to any servitude to the other, to work his whole mine, as far as the flow of water is concerned; in the manner which he deems most convenient and beneficial to himself, although the natural consequence may be, that some prejudice will accrue to the owner of the adjoining mine, so that such prejudice does not arise from the negligent or malicious conduct of his neighbor. But no question arose there respecting any right to support; the controversy being only respecting the obligation to protect an adjoining mine from water which may flow into it by the force of gravitation; and in the very learned judgment of the Court, delivered by my brother Cresswell, there is nothing laid down to countenance the doctrine that, in a case circumstanced like this which we have to determine, the owner of the minerals may, if not chargeable with malice or negligence, remove them, so as to destroy or damage the surface over them, which belongs to another.

We have attempted, without success, to obtain from the codes and jurists of other nations information and assistance respecting the rights and obligations of persons to whom sections of the soil, divided horizontally, belong as separate properties. This penury, where the subject of *servitudes* is so copiously and discriminately treated, probably proceeds from the subdivision of the surface of land and the minerals under it into separate holdings, being peculiar to England. Had such subdivision been known in countries under the jurisdiction of the Roman Civil Law, its incidental rights and duties must have been exactly defined, when we discover the right of adjoining proprietors of land to support from lateral pressure leading to such minute regulations as the following: "Si quis sepem ad alienum prædium fixerit infoderitque, terminum ne excedito; si maceriam, pedem relinquito; si vero domum, pedes duos; si sepulchrum aut scrobem foderit, quantum profunditatis habuerint, tantum spatii relinquito; si puteum, passûs latitudinem." L. 15. ff. fin. reg. The *Code Napoléon* likewise recognizes the support to which the owners of adjoining lands are reciprocally entitled, but contains nothing which touches the question for our decision more closely than the following article on "Natural Servitudes:" "Les fonds inférieurs sont assujettis envers ceux qui sont plus élevés à recevoir les eaux qui en découlent naturellement sans que le main de l'homme y ait contribué. Le propriétaire supérieur ne peut rien faire qui aggrave la servitude du fond inférieur." Book ii. tit. iv. c. 1, art. 640. But reference is here made to adjoining fields on a declivity; not to the surface of land and the minerals being held by different proprietors. The American lawyers write learnedly on the support which may be claimed

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for land from lateral pressure, and for buildings which have long rested against each other; but are silent as to the support which the owner of the surface of land may claim from the subjacent strata when possessed by another. See *Kent's Commentaries*, part vi. lecture ii. vol. 3, p. 434, ed. 1840. However, in *Erskine's Institutes of the Law of Scotland*, treating of the servitude *oneris ferendi*, that very learned author has the following passage, which well illustrates the principle on which our decision is founded: "Where a house is divided into different floors or stories, each floor belonging to a different owner, which frequently happens in the city of Edinburgh, the proprietor of the ground floor is bound, by the nature and condition of his property, without any servitude, not only to bear the weight of the upper story, but to repair his own property, that it may be capable of bearing the weight. The proprietor of the ground story is obliged to uphold it for the support of the upper, and the owner of the upper must uphold that as a roof or cover to the lower." Book ii. tit. 9, s. 11. (See, however, the law of England on this subject—*Pomfret v. Ricroft*, 1 Wms. Saund. 322, n. 1.) For these reasons, we are all of opinion that the present action is maintainable, notwithstanding the negation of negligence in the working of the mines, and that the rule to enter a verdict for the defendant must be discharged. I need hardly say that we do not mean to lay down any rule applicable to a case where the *prima facie* rights and liabilities of the owner of the surface of the land and of the subjacent strata are varied by the production of title-deeds, or by other evidence. — *Rule discharged*.

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November 16, 1850.

Municipal Corporation—Borough Fund—Town Clerk—Quashing Order for Payment of Money—7 Will. 4, & 1 Vict. c. 78, s. 44—Retainer under Seal—Costs—Special Contract—Warding off threatened Litigation.

Although a town clerk, who has acted as solicitor to a municipal corporation, cannot recover his professional costs against them in an action without proving a retainer under the corporate seal, yet, where an order for payment of such costs has been made by the town council, the mere absence of a retainer under seal will not be a sufficient ground for quashing the order under 7 Will. 4, & 1 Vict. c. 78, s. 44, if the costs were incurred under resolutions of the town council.

Where a town council, having laid a borough rate, proceeded to enforce its payment, but were threatened with litigation if they persevered, and in consequence directed their town clerk to consult counsel and take measures to insure them against the threat:—

Held, that the costs occasioned thereby were properly chargeable upon the borough fund under 5 & 6 Will. 4, c. 76, s. 92.

The town clerk was appointed to his office on the basis of a report which fixed his salary at

¹ 20 Law J. Rep. (n. s.) Q. B. 17.

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250*l.* a year, and defined his duties to be (*inter alia*) "to prepare all precepts, orders, and other documents required for laying borough rates, to abide by and see that all orders of the council are properly carried out, and all necessary documents prepared for so doing, and to act as the professional adviser of the mayor and council in the business of the council;" and it also provided, "that he be paid the usual professional charges for conducting or opposing bills in Parliament, conducting actions or suits, &c., preparing leases, &c., and also he be paid all travelling and other expenses out of pocket:"—

Held, that he was entitled to be paid all such extra costs as were *bond fide* incurred for the purpose of warding off threatened litigation, whether litigation did or did not in fact result.

A RULE had been obtained, calling upon the defendants to show cause why a certain order, dated the 22d of March, 1850, purporting to be made by three of the members of the council of the borough of Halifax, directing the treasurer of the said borough to pay to E. M. Wavell 96*l.* 15*s.* for professional charges and disbursements, to be charged to the account of the borough fund, and why certain orders of the council of the said borough, (all which had been returned on *certiorari*.) so far as they related to the payment of the said 96*l.* 15*s.*, should not be quashed.

The question arose as follows: The borough of Halifax was incorporated by a charter, dated the 22d of March, 1848, granted pursuant to 7 Will. 4, & 1 Vict. c. 78, s. 49. At a meeting of the town council, held on the 18th of May, 1849, the following report of a committee appointed to inquire into the duties and salary of the town clerk was adopted by the council: "Your committee, after a careful consideration of the subject, are of opinion that duties devolving upon the town clerk in that capacity, under the Municipal Acts, and the Acts for the Registration of Parliamentary Voters, may be defined as follows: To prepare, issue, and deliver all summonses, circulars, and notices. To attend personally all quarterly and special meetings of the council. To attend either personally, or by satisfactory substitute, all meetings of the various committees and sub-committees. To enter up the various minutes, prepare and publish all necessary notices. Obtain all necessary books and papers for all ordinary and extraordinary elections of aldermen, councillors, and auditors, but not so as to oblige him to be at the expense of deputies and poll-clerks. To attend all such elections. To give notices to parties. To give notices to parties elected. Attend them to qualify. Fix necessary booths. To prepare the burgess list. Attend the revision thereof, prepare all necessary books, papers, notices, and appointments connected therewith. To prepare and forward all returns required by the government. To prepare all reports. To enter the same into the report books. To attend before Justices in support of informations and offences in all cases of summary jurisdiction. To prepare and get allowed all bye-laws. To prepare all precepts, orders, and other documents required for laying watch-rates and borough-rates, (the rates being made out by the collectors.) Notices of other kinds. To abide by and see that all the orders of the council are properly carried out, and all necessary documents prepared for so doing; and to act as the professional adviser of the mayor and council in the business of the council. To

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prepare the parliamentary list of voters, and superintend the preparing and publishing thereof, and to assist the mayor as returning officer in all parliamentary elections. Fix booths, &c., but without prejudice to his claims against the candidates at such elections. Also, that he be paid the usual professional charges for conducting or opposing bills in Parliament, conducting actions or suits at law or in equity, preparing leases, conveyances, or securities. And also he be paid all travelling and other expenses out of pocket. All books, printed forms, and stationery, by the corporation. Also, that he has the general supervision, direction, and management of the offices, and all accounts relating thereto in reference to both the Municipal Corporation Act and the Local Improvement Act. Also, that he find an efficient deputy clerk, who must devote the whole of his time to the duties of his office; and all other assistants that he may require. For the satisfactory discharge of the above enumerated duties, the committee recommend that the salary of the town clerk be fixed at the sum of 250*l*."

It was also resolved, at the same meeting, "that Mr. E. M. Wavell be and he is hereby elected or reelected and appointed town clerk of this borough, to hold such office during the pleasure of the council." At a special general meeting of the council, held on the 15th of June, 1849, it was resolved, "that the duties of the town clerk be defined in accordance with the report of the town clerk's committee, received at the last meeting of the council, except only as to that part of such report which requires that the town clerk shall provide a deputy clerk, who must devote the whole of his time to the duties of his office; and the salary of the town clerk shall for the present be fixed at 250*l*. per annum, in accordance with such report; and that all former resolutions of the council, inconsistent with the tenor of this resolution, be rescinded."

At the last-mentioned meeting, it was resolved, that a borough rate should be made for levying 2363*l*. 18*s*. 10*d*., for the payment of which the borough fund was insufficient, and the mayor was directed to issue precepts under the corporate seal to the overseers of the different townships comprised in the borough, to make returns of the value of the ratable property within the borough; and certain forms for the rate, which had been settled by counsel, were adopted by the council, and a warrant from the mayor was issued to the overseers of the township of Halifax, requiring them to pay out of the poor-rate 1957*l*. 6*s*. 9*d*., their proportion of the borough-rate. The overseers of Halifax consulted a Mr. Holroyde, as their attorney, on the propriety of these proceedings, and Mr. Holroyde accordingly, on the 29th of August, 1849, wrote to Mr. Wavell that the overseers were advised by their counsel that the proceedings of the town council for raising and levying 1957*l*. 6*s*. 9*d*. out of the poor-rate, for corporation purposes, were defective in form, and that the borough-rate could not be enforced. Other correspondence on the subject took place, but without any specific objections to the form of the rate being disclosed, and several meetings of the finance committee took place, (to whom all questions relating to rates were referred,) and ultimately it was decided that the

council should indemnify the overseers against any consequences of the payment of the rate. Accordingly, at a meeting of the council, held on the 3d of October, 1849, a report of the finance committee to the above effect was received, and it was resolved, "that the finance committee be and are hereby empowered to take all such measures, and institute such proceedings, as they may deem expedient for enforcing the prompt payment of all arrears of the borough and watch-rates, and for the purpose of supporting the validity of the rates; and the committee shall have full discretionary power, in the name of the mayor, aldermen, and burgesses, to enter into any agreement, bond, or other instrument, for the purpose of indemnifying and protecting from personal loss all or any constables, overseers, and other public officers, or persons instrumentally employed in the collection or payment of such rates."

At a meeting of the council on the 9th of November, 1849, &c., a new finance committee for the ensuing year was appointed, (any three of whom to form a quorum,) with all the powers given by law to such committees, and with authority "to order and direct such proceedings as may be by such committee deemed necessary or desirable for enforcing payment of borough and township-rates, or otherwise in relation thereto. Also to make orders in writing of the council on the treasurer for payment of money on account of the mayor, aldermen, and burgesses, in all cases such order being signed by three or more members of the council, being members of the finance committee, and countersigned by the town clerk. Also to consider and report to the council, from time to time, what measures are necessary for confining the expenses of the borough within the income of the year. Also to direct and superintend the keeping of all accounts relating to the said borough."

The finance committee thereupon directed that a bond of indemnity should be prepared by the town clerk, under the advice of counsel, which was accordingly done. The draft bond of indemnity by the corporation to the overseers, as prepared by counsel, having been returned objected to by the solicitor of the overseers, as being illegal and beyond the powers of the council, it was resolved at a meeting of the finance committee on the 23d of November, 1849, that a new borough-rate should be laid, and the form for such rate should be settled by counsel, so as to avoid all error. It was also then decided that the council should be advised to appoint a new high constable, as that office had been held jointly with that of treasurer of the borough by the same gentleman, and it was feared that some difficulty might be raised by that circumstance.

On the 27th of November, 1849, at a meeting of the committee, as the counsel who prepared the draft for the council and the counsel who advised the overseers had taken different views of the law in this particular, the town clerk was instructed to propose, that a conference between the two counsel should take place in London. This proposal was assented to by the solicitor for the overseers on condition that the corporation would pay the overseers' expenses, and it was, at a meeting of the

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finance committee on the 30th of November, 1849, resolved that, with a view to prevent any impediment on the part of the corporation to a friendly settlement of the question, the town clerk should be instructed to assent to the expenses of the conference being paid by the town council; and the town clerk was directed to go to London to attend the conference, as it appeared necessary for the benefit of the corporation that he should do so. The conference took place accordingly, and in consequence, the counsel for the corporation advised that a separate appointment of a high constable should be made, and also recommended certain alterations in the forms of rates. Accordingly, a new high constable was appointed, and fresh warrants and documents, to be directed to him, were prepared by the town clerk, in lieu of the warrants, &c., issued to the former high constable.

At a special meeting of the finance committee, held on the 14th of February, 1850, the town clerk informed the committee that he had had an interview with Mr. Holroyde, the solicitor for the overseers, and that Mr. Holroyde stated that the counsel of the overseers had advised that a bond should either be given by the council or that they be compelled to pay the rate. Resolved, that measures be forthwith taken to enforce payment from the overseers of Halifax of the borough-rate. This recommendation was adopted by the council, and summonses and distress warrants were accordingly issued, under which the amount of the rate was levied. The bill of costs of the town clerk for his professional charges, incurred under these resolutions, amounted to 96*l.* 15*s.*, and comprised items of charge for preparing and advising with counsel as to the validity of the bond of indemnity, and for settling the forms for the rates; for attending and writing to Mr. Holroyde in respect of the refusal of the overseers to pay the rate; expenses of and connected with a journey to London to attend the conference, and consulting counsel as to the forms for future rates; of a journey to Wakefield to confer with the clerk of the peace there as to forms of rates, as the opinion of counsel had laid much stress upon the practice adopted in laying county-rates; also of a journey to Manchester to confer with the town clerk there upon the subject of forms of borough-rates, which had been adopted by him after much litigation, and upon which payment had been enforced; items of charge for taking counsel's opinion as to the propriety of appointing a new high constable, and issuing new documents thereon, and drawing the necessary warrants to the new high constable and the overseers to collect the rate. These several expenses were all incurred by the town clerk after and in obedience to the resolutions of the finance committee; but he had no other authority for incurring them except those resolutions.

At a meeting of the finance committee, held on the 22d of March, 1850, &c., a sub-committee, appointed for that purpose, presented a list of accounts contracted by the corporation, and recommended payment thereof, including the bill of Mr. Wavell for 96*l.* 15*s.*, which the finance committee ordered to be paid. Accordingly, the following order (which was the order in question) was drawn upon the treasurer:—

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“ Council of the Borough of Halifax.

“ £96 15s.

Halifax, March 22, 1850.

“ We, the undersigned, members of the council of the borough of Halifax, duly empowered by 5 & 6 Will. 4, c. 76, s. 59, hereby authorize and direct you to pay to Mr. E. M. Wavell the sum of 96l. 15s., for professional charges and disbursements as particularized on the back hereof; which charge to the account of the borough fund.

[Signed by three members of the finance committee,
being also members of the council.

Countersigned by the Town Clerk.]

“ To J. A., Treasurer of the Borough of Halifax.”

At a meeting of the town council, held on the 3d of April, 1850, at which more than one third of the whole council was present, the proceedings of the finance committee were read and approved, and confirmed by the council.

Sir A. Cockburn, (*Solicitor General*), Cowling, and Atherton, for the town council, and Peacock, for the town clerk, now showed cause against the rule.

The question turns upon the right of the town council to order payment of these expenses out of the borough fund. *The Queen v. The Town Council of Lichfield*, 10 Q. B. Rep. 534; s. c. 16 Law J. Rep. (N. S.) Q. B. 333, shows clearly that the town council may sanction the payment of legal expenses out of the borough fund, if they have been incurred for the *bona fide* object of benefiting the corporation. The power to appoint the finance committee is given by 5 & 6 Will. 4, c. 76, s. 70, and they authorized every step which was taken by Mr. Wavell, and their proceedings were, afterwards and before payment, approved of by the council. *The Attorney General v. The Mayor of Norwich*, 2 Myl. & Cr. 406, distinctly lays down the rule that all expenses properly arising out of the duties imposed by the Municipal Corporation Act, may be charged on the borough fund. Here there has been a *bona fide* avoidance of litigation, by means of the exertions of Mr. Wavell; and this having been done under previous resolutions of the finance committee, the costs thereby incurred are properly chargeable on the borough fund. *The Queen v. The Council of the City of Lichfield*, 4 Q. B. Rep. 893; s. c. 12 Law J. Rep. (N. S.) Q. B. 308. Secondly, assuming that these costs might be properly paid, it is said they cannot be legal because there was no retainer under seal, and *Arnold v. The Mayor, &c., of Poole*, 5 Sc. N. R. 741; s. c. 12 Law J. Rep. (N. S.) C. P. 97, is relied on; but that was an action in which the attorney was seeking to enforce his claim against the corporation, whereas in the present case the costs have been paid, and the application is by rate-payers to quash the order of council directing payment because it is improper. The 7 Will. 4, & 1 Vict. c. 78, s. 44, under which this application is made, gives the Court a discretion to disallow or confirm the order; and therefore the Court is put in the position of a court of equity, and is to see whether the money has been paid in fraud or improperly.

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[LORD CAMPBELL, C. J. The power being expressly discretionary, it is, perhaps, even more extensive than that of a court of equity.]

At all events, it should be viewed as a question between trustee and *cestui que trust*. *The Queen v. The Town Council of Lichfield* shows, that even the non-delivery of a bill by the attorney, before payment, would be no objection in such a motion as this, if the payment has been *bona fide* made. In *The Queen v. Thompson*, 5 Q. B. Rep. 477; s. c. *nom.* *The Queen v. The Council of Stamford*, 13 Law J. Rep. (N. S.) Q. B. 177, and *The Queen v. The Mayor, &c., of Warwick*, 8 Q. B. Rep. 926; s. c. 15 Law J. Rep. (N. S.) Q. B. 306, which may be cited on the other side, the orders which were quashed were such as the town council had no power to make. Lastly, these expenses are not included either within the ordinary duty of town clerk, or within the special bargain made with him on his appointment. By the report of the finance committee, what is to be included in the salary of 250*l.* is specified; he is "to act as the professional adviser of the mayor and council, in the business of the council." That is confined to what takes place at a meeting; but if he is required to take ulterior steps in consequence of the advice there given, he is to be paid for them just as any other attorney would be.

[LORD CAMPBELL, C. J. A town clerk is not necessarily an attorney.]

No; and there is nothing in the report which requires him to act for the council in every matter in which an attorney is required. Suppose he is ordered by the council to take an opinion, and attend a conference in London; surely he must be paid for that. Besides, it is stipulated that he is to be paid the usual professional charges for conducting suits and actions at law: if, therefore, these proceedings had resulted in litigation, he would have been clearly entitled to be paid for conducting them, and the fact that he has by his exertions warded off litigation cannot deprive him of that right.

[ERLE, J. You say it is a matter of a contentious nature, and that he may charge for it, although no actual litigation ensued.]

Thomas v. The Mayor, &c., of Swansea, 2 Dowl. P. C. (N. S.) 470; s. c. 12 Law J. Rep. (N. S.) Exch. 73, is very distinguishable from this case. There, the very general words, "attendance on the business of the council and committees," were used; and the charges there made fell clearly within those terms. Here, the most extensive provision is, that the town clerk is to "see that all the orders of the council are properly carried out, and all necessary documents prepared for so doing;" but they cannot possibly include such matters as are here charged for.

Sir F. Thesiger and *Hall*, in support of the rule. First, Mr. Wavell could recover no costs at all in this case. By 5 & 6 Will. 4, c. 76, s. 58, the town clerk is to be paid a salary out of the borough fund, which is, by sect. 92, (besides the particular payments there specified,) to be applied towards paying expenses necessarily incurred in carrying into effect the provisions of that act. It is argued on the other side, that the matters here charged for belong to the duty of a solicitor, and

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not of the town clerk ; but that is not so : his only authority to act at all consists in the resolutions of the committee, and they direct the town clerk, not their solicitor, to take the particular steps required.

[LORD CAMPBELL, C. J. Is not that a mere *designatio personæ* ? He did not go to London as town clerk.]

It is contended that he did. At all events, there has been no retainer of Mr. Wavell as solicitor ; and therefore, although his charges may have been paid by the council, such payment is, as against the rate-payers, a misapplication of the funds. The case has been argued as if the absence of a retainer under seal were a mere technical objection ; but without it no liability to pay for the services of the solicitor can be implied against the rate-payers. *The Queen v. The Mayor, &c., of Stamford*, 6 Q. B. Rep. 433. In *The Queen v. The Town Council of Lichfield*, there had been a retainer under the seal of the town clerk ; so that the present objection did not there apply. If it is held that such a retainer is unnecessary, *Arnold v. The Mayor, &c., of Poole* must be overruled.

[LORD CAMPBELL, C. J. Do you contend that every payment made by the town council, which could not be enforced against them, is necessarily a misapplication of the borough fund ?]

Yes. *The Queen v. The Mayor, &c., of Warwick*. It is said that, under the 7 Will. 4, & 1 Vict. c. 78, s. 44, the court has a discretion in dealing with this order ; but such discretion applies only to giving or refusing costs. If there is a misapplication of the funds, the order must be quashed. Secondly, even supposing that Mr. Wavell could, under any circumstances, be entitled to those costs, he is precluded from being so by his acceptance of the 250*l.* a year salary, with the duties defined, as in the report. There being an express stipulation that he is to be paid for conducting bills in Parliament and for suits and actions and usual conveyancing charges, the maxim *expressio unius est exclusio alterius* applies ; and all other duties to be performed by him must be paid for by the salary. *Thomas v. The Mayor, &c., of Swansea* strictly applies. The town clerk is to be the professional adviser of the council, and is to carry out all orders of council, and to prepare all documents. Those terms are wide enough to embrace all these services. It is said he cannot possibly be obliged to go out of the borough ; but the report speaks of his being paid all travelling expenses, thereby impliedly recognizing his being employed out of the borough. The loss of time would have been specified, if it were intended to be paid for. As to the charges for getting the forms for the rates settled, that is clearly part of his prescribed duty, in preparing all precepts, orders, and other documents for laying rates.

[ERLE, J. He found certain forms in use ; but, on account of some mysterious defects which are suggested in them, he is directed to get new forms settled by counsel. Surely, it is a faithful discharge of duty by the town council to take steps to insure the validity of their rates.]

As to any litigation being avoided by the course taken by Mr. Wavell, that is not so. The 7 Will. 4, & 1 Vict. c. 81, s. 1, provides, that if the overseers refuse to pay the rate, the amount may be levied

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by distress upon their goods, or upon the goods of the persons liable to pay the rate. If, accordingly, a summons has been applied for, the town clerk must have attended it as part of his duty.

[ERLE, J. There are few operations of greater difficulty than that of enforcing borough-rates.]

At all events, some of these items are such as ought not to be paid, such as those relating to the appointment of the new high constable; but the order applies to the whole bill.

The Court asked *Peacock* whether he would agree that the bill should be taxed as to any items which they might think questionable; to which he acceded.

LORD CAMPBELL, C. J. On that understanding, I think this rule should not be made absolute. The application is founded on the 7 Will. 4, & 1 Vict. c. 78, s. 44, which is a most salutary enactment, and ought not to be frittered away. It vests in the Court a discretion to see whether there has been a misapplication of the borough fund; and that discretion extends to setting aside or confirming the order, as well as to giving costs. I do not agree that a payment is improper merely because it cannot be enforced in an action; we must see if there is any grievance inflicted by it. No doubt, if there has been a clear misapplication, we are bound to quash the order. In the present case, the ground of the application is, that the order is altogether illegal; and it is said that, even if Mr. Wavell has done any business which is not covered by the salary of 250*l.*, he cannot recover for such business, because he has no retainer under the corporation seal. I think, if the business was done *bona fide* for the benefit of the rate-payers, that he is entitled to recover for it, even though there is no such retainer. *Arnold v. The Mayor, &c., of Poole* decides only that such a claim cannot be enforced by action against the corporation, but does not affect a proceeding under this statute. The great point, therefore, is, whether the 250*l.* a year salary covers the items contained in this bill. We must look with jealousy at charges of this sort, made by a town clerk who is also an attorney; and I regret very much that no clause was introduced into the Municipal Corporation Act, providing that a bill for such extra charges should in all cases be taxed before it could be paid by the town council. But no such clause is there inserted, and the question therefore is, Are the main charges such as Mr. Wavell is entitled to be paid for beyond his salary? And I am of opinion that they are. I look to the exceptions in the contract by which he is bound, and I there find his "usual professional charges for conducting actions at law or suits in equity," &c. Now, on the fair construction of this exception, he would be paid for conducting not only actions and suits, but also a *mandamus* for the purpose of settling disputes. Suppose there had been an action, which is clearly within the exception, where would he be entitled to begin his charges? At what point would there be a *lis mota*? I think he might include within the exception every thing that he did fairly with a view to bringing an action, or to preventing one from being brought. If the

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present proceedings had resulted in an action, Mr. Wavell would have been entitled to charge for them; and I think he is equally entitled to charge for trying to arrange the dispute without action. If so, he might charge where no actual litigation has ensued, because it has been prevented by his laudable exertions. For such items, therefore, as fall within that principle, I think the order is valid. There are other items which are much more doubtful, and as to these certainly there ought to be a taxation.

COLERIDGE, J. The main question here is, whether under sect. 44 of the 1 Vict. c. 78, there has been any misapplication of the borough fund, either by means of fraud or gross error of judgment. The town council have been likened, and not inaptly, to trustees, and their conduct may be viewed in the same light as that of trustees. Here it is said, there is a total want of foundation for the order, because there is no retainer under seal. When we are considering whether there is a misapplication of the funds, I should take the real question to be, whether a wrong appropriation of the public money has taken place, and not merely whether the town council could have been compelled by action to pay what they have paid. I must assume that, substantially, there has been an order for the applicant to do the work he charges for, and therefore the absence of the seal is no objection on this proceeding. We must also assume, on this part of the case, that the services have been rendered, and that the applicant is entitled to remuneration for them, which can only be by an order of the council. The answer given is twofold: first, that every thing which has been done is included in the duties of the town clerk; but if not, that Mr. Wavell is precluded by his agreement from being paid for them at all. Speaking only of the main items of the bill, I think they do not fall within the duties of town clerk, which are to be remunerated by the 250*l*. I find nothing except the general words, "acting as professional adviser." That does not involve doing all things which may be advised as necessary to be done. On broad principles of sense, that could not be so; for though Mr. Wavell might be willing to give his best advice for 250*l*. a year, if he were required to do all that had to be done afterwards he certainly would not have entered into such an agreement; and this is a fair ground for construing the contract. Then, does it come within the specified cases? I am not sure whether it does. But, at all events, I see there has been an order, and if so, it is enough; he is not to be precluded because it does not fall within the specified cases, for in such a case I do not think the maxim *expressio unius est exclusio alterius* properly applies.

ERLE, J.¹ All the main grounds laid on moving for the rule fail. The point as to there being no retainer under seal is perfectly untenable, for the reasons already stated by the Court. It also appears to me that it is not made out that the town council ought not to have incurred these expenses, and therefore could not charge them on the borough fund under sect. 92 of the Municipal Corporation Act.

¹ WIGHTMAN, J. was sitting in the Court for Crown Cases Reserved.

Remmett v. Lawrence.

No person who has heard this case can fail to see that a more salutary exercise of the powers confided to them could not well have taken place. The corporation were threatened with litigation if they proceeded to take certain steps, and they, in consequence, directed their town clerk to take measures to insure them against the threat. The great contest has been, that by the special contract Mr. Wavell could not recover for this business, which, it is argued, is paid for by his salary of 250*l.* a year. I have looked through the matters which he is to do under the contract for the 250*l.*, and I cannot find that extra expenses of this kind are to be included in it. I quite agree with my brother Coleridge that the fact of none of these items being expressly mentioned in the contract will not preclude his charging for them. In addition to what it is specifically provided he may charge for, we must read the words as including matters like those now in question. He is to be paid "the usual professional charges for opposing or conducting bills in Parliament, conducting actions or suits at law or in equity." In the course of conducting a bill in Parliament, long before the petition is actually presented to the House, there would be many charges which the solicitor would have a right to be paid by his client. And so, in conducting a suit, there are many charges which are incurred before the action actually begins. If these proceedings had resulted in litigation, Mr. Wavell would, therefore, have been entitled to recover his charges for them. And we cannot say that he is not equally entitled to recover them because no litigation, in fact, did result. I think they clearly are such charges as were meant by the parties to the contract to be paid for beyond the salary. The greater part of the items seem to me to be connected with the journey, and advice taken to ward off this threatened litigation. A smaller portion may, perhaps, not fall within that class; but the Master will decide which of the items do and which do not come within the principle which we have laid down; and after he has reported to us, we can mould the rule so as to meet the requirements of the case. The rule should therefore be enlarged, the bill of costs to be referred to the Master to inquire and report to us on the items. — *Rule enlarged accordingly.*

REMMETT v. LAWRENCE.¹

November 8, 1850.

The sheriff returned to a writ of *fi. fa.* against W., that before the delivery thereof to him another writ of *fi. fa.* against W. was delivered to him, and that by virtue thereof he seized the goods of W. In case against the sheriff for a false return:—

Held, First, that the sheriff was not estopped by his return from showing that the goods seized under the first writ were not the goods of W.

Secondly, by Erle, J., that though the judgment on which the first writ issued was fraudulent, the sheriff seized the goods of W. under the first writ, and not under plaintiff's writ.

The decision in *Inray v. Magnay*, 11 M. & W. 267. 7 Jur. 240 doubted.

¹ 14 Jur. 1067. 20 Law J. Rep. (N. S.) Q. B. 25.

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CASE against the sheriff of Middlesex. The first count of the declaration stated that the plaintiff, on, &c., obtained a judgment in the Court of Queen's Bench against one John Webb, for 89*l.* 12*s.* damages and costs, and that he, for obtaining satisfaction thereof, caused a writ of *fi. fa.* to be issued against the goods and chattels of the said John Webb, and that the same was delivered to the sheriff to be executed; by virtue of which said writ the defendants, so being sheriff, &c., seized and took in execution divers goods and chattels of the said John Webb: that the plaintiff then obtained a judge's order to return the writ to the Court; yet the defendants, being such sheriff of the county of Middlesex, falsely returned to the Court upon the said writ, "that by virtue of a certain other writ of *fi. fa.* before then delivered to the defendants, to wit, on, &c., for execution against the goods and chattels of the said John Webb, at the suit of one Robert Lounds, for 135*l.* debt, and 8*l.* 10*s.* damages, together with interest as therein mentioned, they, the defendants, caused to be seized and taken in execution the said goods and chattels of the said John Webb, in their said bailiwick, so seized and taken in execution by virtue of the said first-mentioned writ as aforesaid, as by the said writ and return thereof," &c., "fully appears;" by means of which premises the plaintiff hath been and is greatly injured, and deprived of the means of obtaining the moneys indorsed on the writ. The second count charged that the defendants did not, within a reasonable time for that purpose, seize and take in execution the goods and chattels of John Webb, under or by virtue of the plaintiff's writ of *fi. fa.* Pleas — first, to the whole declaration, not guilty; secondly, to the first count, that the defendants did not, by virtue of the said writ, seize and take in execution the goods of the said John Webb, in manner and form, &c.; thirdly, to the first count, that the defendants did, by virtue of a certain other writ, seize and take in execution the goods of the said John Webb, as alleged in the return, in manner and form, &c.; fourthly, to the second count, *nulla bona*. Issues thereon. On the trial, before ERLE, J., at the Surrey Summer Assizes, it was contended for the plaintiff, that though the judgment obtained by Lounds against Webb was prior in point of time, it was fraudulent, and therefore the judgment obtained by the plaintiff had priority. The plaintiff called Mrs. Webb; she denied that she was the wife of Webb, and said that the goods seized by the sheriff were her goods, and not the goods of Webb. The plaintiff, who was taken by surprise by this evidence, then contended that the sheriff was estopped, by his return to the plaintiff's writ, from denying that the goods were the goods of Webb. The learned judge left two questions to the jury, in answer to which they found that the goods were not the goods of Webb, but that the judgment obtained by Lounds was fraudulent; and a verdict was entered for the plaintiff on the plea of not guilty as to the first count, and for the defendant on the second, third, and fourth issues, and on the plea of not guilty as to the second count; leave being reserved to move to enter a verdict for the plaintiff on the third issue, and on the plea of not guilty as to the second count.

Remmett v. Lawrence.

Prentice now moved, first, for a rule *nisi* for a new trial, on the ground of misdirection. The sheriff returned that he had seized goods of Webb under the writ at the suit of Lounds. [*Lord Campbell*, C. J. — The return is no more than an argumentative return of *nulla bona*. *Erle*, J. — And the evidence showed that there were no goods of Webb.] The statement at the end of the return is a material portion of it, and the sheriff is bound by it. *Watson's Office of Sheriff*, 95, 2d ed. *Shaw v. Simpson*, 1 Lord Raym. 184. *Field v. Smith*, 2 M. & W. 388; 1 Jur. 358. The only instance in which the sheriff has been held not bound by his return, is where the defendant became bankrupt before the judgment, and the plaintiff knew of his insolvency at the time of action brought. *Brydges v. Walford*, 6 Mau. & S. 42. *Standish v. Ross*, 3 Exch. 527; s. c. 19 Law J. Rep. (N. S.) Exch. 185. [*Lord Campbell*, C. J. — If the sheriff states in his return an excuse for not levying, and it appears that he has a good reason for not levying, is he bound by the excuse alleged? Is he bound by every statement in his return?] He is bound by every material statement in his return; and the statement, that he had seized goods of Webb under a writ before delivered to him, would mislead the plaintiff. In *Imray v. Magnay*, 11 M. & W. 267; 7 Jur. 240, which was an action for making a false return of *nulla bona*, and the defence was, that at the time of receiving the plaintiff's writ, the sheriff had seized the goods of the execution debtor under prior writs of execution, it was held, that the sheriff was liable upon proof that the prior writs were founded upon judgments fraudulent against creditors. [He also cited *Christopherson v. Benson*, 3 Exch. 160; s. c. 18 Law J. Rep. (N. S.) Exch. 60.] Secondly, the plaintiff is entitled to the verdict on the second issue. When it was proved that the first writ was founded on a judgment obtained by fraud, the averment that the sheriff seized under the plaintiff's writ was proved; because the sheriff, in point of law, seized under the second writ. 1 Chit. Arch. 591. Even supposing the prior writ was good, the averment in the second plea was proved. Thirdly, the same question arises on the second count. Fourthly, the plaintiff is entitled to judgment *non obstante veredicto* on the issue on the second plea. [*Erle*, J. — You cannot have judgment *non obstante veredicto* while there is one good bar on the record. *Lord Campbell*, C. J. — Judgment *non obstante veredicto* means final judgment in favor of the party.]

LORD CAMPBELL, C. J. When the proper opportunity arises, I should like to hear the question in *Imray v. Magnay*, 11 M. & W. 267; 7 Jur. 240, reconsidered; because the decision in that case places the sheriff in a most perilous position, whatever course he pursues; but on the present occasion we are not called upon to give any opinion on the question involved in that case. Here the question is, whether the sheriff is estopped by the statement in his return that he had seized the goods of the execution debtor under a prior execution. If he had returned to the plaintiff's writ that he had taken goods of Webb, or that he had goods of Webb in his hands, it would have

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been a case of estoppel; but the return is substantially a return of *nulla bona*, and he gives as the excuse for not levying under the plaintiff's writ, that he had already seized all the goods of Webb in his bailiwick, under a writ at the suit of Lounds. He is not estopped from showing that that excuse is inaccurate; there is a clear distinction between this return and the other. Then, it being open to the sheriff to prove that another person is the real owner of the goods, and that Webb has not, and never had, any goods within his bailiwick, this entitles him to a verdict on the material issues; and, therefore, I am of opinion that the rule should be refused.

PATTESON, J. It is conceded, that if the sheriff had returned *nulla bona*, though he had seized goods under the writ, he would be at liberty to show that they were not the goods of the execution debtor. Here the return is, in effect, that under a prior execution he had seized goods as the goods of the execution debtor, and that statement cannot be taken as concluding him from showing that they were not in fact the goods of the execution debtor. It is not like a return of *fi. fe.*, which estops the sheriff; it is no more than that he seized goods which he considered goods of the execution debtor. That renders it unnecessary to go into the question decided in *Imray v. Magnay*, viz., how far the sheriff is bound by a judgment fraudulent against creditors, or to say whether that case was rightly decided or not.

ERLE, J. The action is in reality for not levying on the goods of Webb, for the satisfaction of the plaintiff's judgment against him; and the return of the sheriff is in reality a return of *nulla bona*: the statement, that he had seized goods of Webb under a prior writ at the suit of Lounds, is added only by way of information, which was not essential to be given, and does not prevent the sheriff from showing that he was mistaken. As to the second and third issues, though the sheriff is in possession under every writ which he has at the time of seizure, he seized under the writ at the suit of Lounds, and the plaintiff himself has put that construction upon the act of the sheriff in the statement of his complaint in the declaration. The present case affords abundant proof of the difficulty under which the sheriff is placed by the decision in *Imray v. Magnay*, because he had tried to protect himself under the Interpleader Act, and by proposing to the plaintiff to give him an indemnity, but in vain. It is hardly to be supposed that the sheriff is liable to an action under such circumstances. — *Rule refused.*

As a general principle, it is undoubtedly true that an officer is not allowed to contradict or falsify his return. *Gardner v. Hosmer*, 6 Mass. 325. But this rule is not to apply to the return of any collateral fact, not necessary to be returned, in order to make the proceedings valid. *Richardson, C. J.*, in *Lewis v. Blair*, 1 New Hampshire, 70. So statements in

his return of the time on which certain acts were done; of the value of certain property therein attached; (*Weld v. Green*, 10 Maine, 20;) or of the ownership of such property, may all be denied by such officer, and the true fact shown. Accordingly, it has been frequently held, that although an officer returns on *meine* process, that he has attached certain prop-

Howard, *Ex parte*.

Ex parte HOWARD, GENT.,¹ &c.

Queen's Bench Bail Court,² November 21, 1850.

Attorney — Re-admission — 37 Geo. 3, c. 90, s. 31, and 6 & 7 Vict. c. 73, s. 25 — Renewal of Certificate.

It is not necessary for an attorney who has ceased to take out his certificate for a year previous to the passing of the statute 6 & 7 Vict. c. 73, to apply to be re-admitted as an attorney, on his desiring to practise again. It is sufficient for him to obtain a rule to renew his certificate.

THIS was a motion for the re-admission of the applicant as an attorney, or for an order authorizing the registrar to renew his certificate.

The applicant was admitted an attorney in 1834, and he regularly practised and took out his certificate until 1841, since which date he had neither practised nor taken out his certificate.

Atherton, in support of the motion. The question is, whether the rule should be for the re-admission of the party as an attorney, or whether it will be sufficient for him to renew his certificate. The first alternative, it is submitted, is the correct one. The 37 Geo. 3,

erty as the property of the defendant, he may, nevertheless, show, in an action against him for negligence in not seizing such goods on execution, or for a false return, when he has returned *nulla bona* on the execution in such suit, that the property attached did not in fact belong to the defendant: he is not to be considered by his return as guaranteeing or warranting such property to be the defendant's, but simply that he attached it *as* his, leaving the fact to be determined afterwards, should any controversy arise respecting it. See *Fuller v. Holden*, 4 Mass. 498. *Canada v. Southwick*, 16 Pick. 556, 559. *Arnold v. Brown*, 24 Pick. 89. *Hopkins v. Chandler*, 2 Harrison, 299. And as a general rule, a receiptor, to whom the officer has delivered the property attached, for safe keeping, has the same right, (*Fisher v. Bartlett*, 8 Greenl. 122. *Learned v. Bryant*, 13 Mass. 224. *Lathrop v. Cook*, 14 Maine, 414,) unless he has estopped himself by acknowledging in his receipt that the title to such property is in the defendant, (*Sawyer v. Mason*, 19 Maine, 49. *Dezell v. Odell*, 3 Hill, 216,) in which case the officer would also be estopped from denying the same fact. *Penobscot*

Boom Corporation v. Wilkins, 27 Maine, 345. But an officer cannot deny his return as to what he *does*, and "if he returns that he attached certain personal property, describing it, he cannot be permitted, in an action by the creditor, to say, that he never did attach such property." Putnam, J., in *Canada v. Southwick*, 16 Pick. 558. So, if he returns that he attached a certain quantity of property, he cannot show, in defence of an action for not producing the same on execution, that in fact not so much was attached. *Haynes v. Small*, 22 Maine, 14. *Lawson v. Main*, 4 Pike, 184.

In any action against a sheriff for a false return to a *fi. fa.* the plaintiff must show a valid judgment on which the execution issued. *McDonald v. Bunn*, 3 Denio, 45. And an officer who originally seized the goods on the process of the plaintiff, but who now claims to hold them on a legal process from some subsequent attaching creditor, may show, in an action against him by the first attaching creditor, for not returning such goods on his execution, that the plaintiff's judgment was fraudulent and void. *Clark v. Foxcroft*, 6 Greenl. 296. *Pierce v. Jackson*, 6 Mass. 242.

¹ 20 Law J. Rep. (N. S.) Q. B. 27.

² The Bail Court is an auxiliary of the Court of Queen's Bench at Westminster, wherein points connected more particularly with pleading and practice are argued and determined.

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c. 90, the statute in force when the applicant ceased to take out his certificate, by sect. 31, makes null and void the admission of an attorney who has omitted to take out his certificate for a year. The recent statute, the 6 & 7 Vict. c. 73, repeals that section, and, by sect. 25, only requires that the attorney should come to the Court for an order authorizing the registrar to renew his certificate. But it is apprehended that the recent statute has no retrospective effect to the case of an attorney whose admission has already been avoided by the previous statute.

[*Master Bunce.*—The practice has been for attorneys who have ceased to take out their certificates for many years, to do no more than to apply for a renewal of their certificate under the recent act.]

PATTESON, J. The question is one purely of form. If it be necessary for the applicant to be re-admitted, it may be contended that the several persons who, under similar circumstances, have merely taken out their certificates, are not, in reality, attorneys. As I should be extremely sorry to throw any doubt upon the sufficiency of the course they had taken, you had better take your rule in the usual form to renew the certificate. The renewal of the certificate under the recent statute will be virtually a re-admission of the applicant. — *Rule granted accordingly.*

DE PORQUET v. PAGE.¹

November 23, 1850.

Stamp — Agreement, Evidence of — Acknowledgment of Terms previously agreed upon — Complete Contract — Admission.

A declaration alleged, in substance, that the defendant obtained S. D. as a partner for the plaintiff in his business, upon the terms, amongst others, stated in the declaration; that the plaintiff afterwards paid to the defendant 25*l.* for obtaining the said partner, and it was then agreed between the plaintiff and the defendant, that the plaintiff should accept and deliver to the defendant a bill of exchange for 27*l.* 10*s.*, payable in eighteen months, upon condition that S. D. should accept the partnership beyond two years, but if S. D., at the expiration of eighteen months, should give notice of his wish to retire from the partnership, and not rescind it, the said bill should be null and void; that in consideration of the plaintiff's delivering the said bill, accepted, to the defendant upon the said condition, the defendant promised, if he should negotiate it, and the said notice were given, and not rescinded, to indemnify the plaintiff from the payment of the said bill and all costs, &c.; that the defendant afterwards negotiated the bill; that the plaintiff had been compelled to pay the amount; that S. D. gave notice, at the end of eighteen months, of his wish to retire from the partnership, and did not rescind the same. Breach, that the defendant had not indemnified the plaintiff from the payment of the said bill.

The defendant pleaded *non assumpsit*, and a traverse of the condition upon which the bill was given; and at the trial, the following unstamped document, signed by the defendant, was admitted, as part of the evidence on behalf of the plaintiff:—

“Mem. — I have this day received of Mr. Fenwick de Porquet a bill for 27*l.* 10*s.*, at eighteen

¹ 20 Law J. Rep. (n. s.) Q. B. 28.

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months' date, on condition that Mr. Samuel Douglas accepts the partnership beyond two years; but should Mr. Douglas give notice at the expiration of eighteen months, (the bill to be null and void,) and not afterwards rescind the same: "—

Held, that the document had been properly received in evidence without an agreement stamp.

ASSUMPSIT. The declaration alleged that the plaintiff, having retained and employed the defendant to obtain a partner for the plaintiff, in his trade of a bookseller and publisher, the defendant did obtain such partner, to wit, one S. D., who entered into copartnership with the plaintiff for the term of two years, upon the terms, amongst others, that if the said S. D. should, six months prior to the end of the said term, give notice to the plaintiff of his wish to retire from the said trade, the plaintiff should, at the expiration of such notice, pay to S. D. 2000*l.* and his proportion of profit up to that time, beyond the sums drawn out in anticipation of profits, &c. That afterwards, to wit, &c., the plaintiff paid to the defendant 25*l.* for obtaining the said partner, and it was then agreed between the plaintiff and the defendant, that the plaintiff should accept and deliver to the defendant a bill of exchange for 27*l.* 10*s.*, payable eighteen months after date, upon condition that S. D. should accept the said partnership beyond two years; but, if S. D. should, at the expiration of eighteen months, give the notice above mentioned, and not rescind it, the said bill should be null and void. That in consideration that the plaintiff would deliver the said bill accepted to the defendant, upon the said condition, the defendant promised that if he should negotiate the said bill, and if S. D. should give to the plaintiff the said notice as aforesaid, and not rescind it, he, the defendant, would indemnify the plaintiff from the payment of the bill, and all costs and expenses which he might necessarily and unavoidably incur and pay by reason of the defendant's having negotiated the said bill. The declaration then averred the delivery of a bill of exchange drawn by the defendant upon, and accepted by, the plaintiff for 27*l.* 10*s.*, payable eighteen months after date; that the defendant afterwards indorsed the bill to E. J., who indorsed it to H. B. and W. S., who, after the bill became due, commenced an action thereon against the plaintiff, by means whereof the plaintiff was obliged to pay, and did necessarily and unavoidably pay the amount of the said bill, and 1*l.* 1*s.* for the costs of the said action, of which the defendant had notice. That S. D. did not accept the said partnership beyond two years, but at the expiration of eighteen months gave notice to the plaintiff of his wish to retire from the same, and did not rescind the same, although a reasonable time had elapsed, &c. That the defendant had not in any manner indemnified the plaintiff for the payment of the said bill and costs, or any part thereof, although a reasonable time for that purpose had elapsed. (There were also the common counts for money paid and on an account stated.)

Pleas—Non assumpsit, and a traverse of the condition upon which the bill of exchange was received *modo et forma*.

On the trial, before LORD CAMPBELL, C. J., at the Sittings at West-

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minster after Easter term last, a verdict was found for the plaintiff for 28*l.* 11*s.*, subject to leave reserved to the defendant to move to set that verdict aside, and to enter a nonsuit, on the ground that the following document, admitted as part of the evidence in support of the plaintiff's case, had been improperly received without an agreement stamp:—

“London, July 10, 1848.

“Mem.—I have this day received of Mr. Fenwick de Porquet a bill for 27*l.* 10*s.*, at eighteen months' date, on condition that Mr. Samuel Douglas accepts the partnership beyond two years; but should Mr. Douglas give notice at the expiration of eighteen months, (the bill to be null and void,) and not afterwards rescind the same.

“J. H. PAGE.”

A rule *nisi* having been obtained pursuant to the leave reserved,—

Bovill and *Hugh Hill* now showed cause. The document did not require a stamp. It was part only of the evidence adduced, from which the jury were to infer that an agreement as alleged had been made. It is no more than a memorandum to the effect that the defendant had before entered into an agreement, and was merely for the purpose, as it were, of ear-marking the bill that was given, in pursuance and part performance of the prior complete agreement. *Langdon v. Wilson*, 7 B. & C. 640, *n.*; s. c. 6 Law J. Rep. K. B. 177. *Notley v. Webb*, 5 Com. B. Rep. 834. *Mullett v. Huchison*, 7 B. & C. 639; s. c. 6 Law J. Rep. K. B. 176. *Barry v. Goodman*, 2 Mee. & W. 768; s. c. 6 Law J. Rep. (N. S.) Exch. 188. *Blackwell v. M'Naughtan*, 1 Q. B. Rep. 127. The cases of *Vaughton v. Brine* and *Lucas v. Beach*, 1 Man. & G. 359; s. c. 9 Law J. Rep. (N. S.) C. P. 326, 417, clearly show that where the memorandum is not to operate as the contract between the parties, it does not require a stamp, and the principle of those cases was adopted in *Marshall v. Powell*, 9 Q. B. Rep. 779; s. c. 16 Law J. Rep. (N. S.) Q. B. 5.

[LORD CAMPBELL, C. J. Suppose a person to give a memorandum stating that he acknowledged that he had entered into an agreement for a stated purpose; would that be receivable in evidence without a stamp?]

According to the authority of decided cases, it would. *Willey v. Parratt*, 3 Exch. Rep. 211; s. c. 18 Law J. Rep. (N. S.) Exch. 82, shows how strict the rule is, that requires that the entire contract should be contained in the writing, in order to make a stamp necessary.

[ERLE, J. You say that there was a clear agreement before, and that in pursuance and part performance of it, this memorandum was handed over by the defendant.]

Just so. But supposing even that there was not a complete agreement without it, still no stamp was necessary, as it does not contain the whole agreement.

Ball, contra. The words of the Stamp Act as to agreements are,

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"whether the same shall be only evidence of a contract, or obligatory upon the parties from its being a written instrument;" and this memorandum falls within that enactment. The cases relied upon proceed upon the ground, that the particular document contained no more by way of agreement than the law would have implied from the other words expressing an acknowledgment of something having been done.

[LORD CAMPBELL, C. J. Suppose this memorandum be taken to express more than the law would imply; does it contain the whole agreement between the parties?]

It contains the whole agreement as to the 27*l.*, which is, in truth, a separate and distinct agreement in itself. In *Marshall v. Powell*, the memorandum appeared clearly to be in pursuance of a previous complete stamped agreement, and was not meant to be evidence of the contract. In *Doe d. Frankis v. Frankis*, 11 Ad. & E. 792; s. c. 9 Law J. Rep. (N. S.) Q. B. 177, the decision in *Mullett v. Huchison* is questioned, and only adopted upon the express ground, that there the memorandum was never meant to be evidence of the agreement between the parties. Here the memorandum was meant to be, and was adduced as evidence of the agreement. It ought, therefore, to have been stamped.

ERLE, J.¹ I think this rule ought to be discharged on two grounds: first, looking to the evidence and all the circumstances of the case, it appears to me there was a distinct antecedent agreement with reference to the partnership, which may now be assumed either to have been in writing and stamped, or proved by parol evidence; and then, in pursuance of the terms of such agreement, the bill of exchange is accepted and delivered to the defendant, who thereupon acknowledges in writing the terms upon which the bill had been so accepted and received. This acknowledgment may be some evidence of the contract as a subsequent admission; but according to all the cases, a memorandum which is only evidence of an antecedent complete contract, does not require a stamp. I also think this is within the class of cases that decide that a memorandum of acknowledgment, which expresses further the same consequence only, as the law would imply from that which is acknowledged, need not be stamped. It appears to me the bill of exchange would have been received without value upon the partnership being put an end to at the expiration of two years, but for value if the partnership were continued beyond that time.

LORD CAMPBELL, C. J. Although I admitted the memorandum at the trial without a stamp, the inclination of my opinion then was against its admissibility. But, after hearing the argument, I think, upon the cases cited, and for the reasons given by my brother Erle, in which I concur, that the verdict ought not to be disturbed. — *Rule discharged.*

¹ Coleridge, J., had left the Court, and Wightman, J., was sitting at Nisi Prius in London.

Rogers & another v. Driver.

ROGERS & another v. DRIVER.¹

November 27, 1850.

Copyright of Designs — 6 & 7 Vict. c. 65 — Shape and Configuration — Registration — Patent.

By 6 & 7 Vict. c. 65, a limited copyright is granted for "any new or original design for any article of manufacture having reference to some purpose of utility, so far as such design shall be for the shape or configuration of such article," provided such design is registered.

A newly-invented brick, the utility of which consisted in its being so shaped that, when several bricks were laid together in building, a series of apertures was left in the wall, by which the air was admitted to circulate, and a saving in the number of bricks required was effected, is a design capable of being registered under the above statute.

Semble, that where the invention is the subject of a patent, it may still be registered under the Copyright of Designs Act.

ASSUMPSIT on an agreement whereby the plaintiffs, who were jointly interested in a certain original design for the manufacture of bricks, called "Ventilating Bricks," which had been invented by one of the plaintiffs, and registered by him under 6 & 7 Vict. c. 65, appointed the defendant their agent for making and granting their licenses to make the said bricks at a certain royalty therein mentioned, and whereby the defendant agreed to pay down 100*l.*, part of the said moneys. Breach, non-payment of 50*l.*, parcel of the said sum of 100*l.*

Plea, (amongst others,) that the said original design was not a new and original design within the meaning of 6 & 7 Vict. c. 65, whereby the said alleged registration thereof was void and of no effect; that the defendant entered into the said agreement on the faith and consideration that the said design was a new and original design within the meaning of the said act, and not otherwise, and that the plaintiffs, or one of them, had the sole right to apply the said design, and to sell bricks according to the said design, and of appointing the defendant as agent, and that there never was any other consideration or value for the defendant's said agreement or promise.

Replication, that the said original design was a new and original design within the true intent and meaning of the said statute. Issue thereon.

At the trial, before PATTESON, J., at the Berkshire Spring Assizes, 1850, it appeared that the novelty and utility of the ventilating bricks consisted in their being so shaped, that, when laid together in building, a series of apertures was left in the interior of the wall, in consequence of which the air was more freely admitted through the wall, and a considerable saving in the number of bricks required was effected. It was also proved that, from the conformation of these bricks, there was a less duty payable than on the quantity of ordinary bricks necessary to form a corresponding extent of building. For the defendant, it was contended that this was not such a design as formed the subject of registration under the acts passed for that purpose,

but was the subject only of a patent, and that it was not competent therefore for the plaintiffs to register it as a design. The learned Judge ruled that the design was within the 6 & 7 Vict. c. 65, and the plaintiff had a verdict for 50*l*.

In the ensuing term, a rule *nisi* having been obtained for a new trial, on the ground of misdirection, —

Alexander and *Selfe* now showed cause. The plaintiffs' invention was clearly within the provisions of the 6 & 7 Vict. c. 65, s. 2, which extends the former act of 5 & 6 Vict. c. 100, to the registering of "any article of manufacture having reference to some purpose of utility, so far as such design shall be for the *shape or configuration* of such article, and that whether it be for the whole of such shape or configuration or only for a part thereof." The preamble expressly declares that "it is expedient to extend the protection afforded by the 5 & 6 Vict. c. 100, to such designs hereinafter mentioned (not being of an ornamental character) as are not included therein." Here it was proved that this is a new and original design in an article of manufacture, and that it is of utility, and that the claim of the plaintiffs is for the configuration or shape of the brick. The 2d section of 6 & 7 Vict. c. 65, makes an express exception as to matters of sculpture, and in no other respect. Besides, this could not properly have been made the subject of a patent. *Godson on Patents*, 50. The plaintiffs, therefore, had a clear right to secure to themselves the limited right given by the 6 & 7 Vict. c. 65. This would clearly have been within the provisions of the repealed act, 2 Vict. c. 17, the first act relating to the registration of such articles, and which is extended by the subsequent acts.

Gray, in support of the rule. The 6 & 7 Vict. c. 65, was not intended to give protection to any manufacture for which a party might before have taken out a patent. The 5 & 6 Vict. c. 100, repealed several former acts, which are mentioned in a schedule to the act; and the object of all those acts was to protect designs not the subject of a patent. The "shape and configuration" which is protected by the 6 & 7 Vict. c. 65, is that which may make an old article more useful; but it does not apply to a new manufacture, such as could be the subject of a patent. Now, this brick is clearly the subject of a patent, as it is a new and useful invention. The evidence showed that by means of it the wall may be built cheaper, and the house better ventilated.

[WIGHTMAN, J. Those are merely the results of the shape and configuration.]

[ERLE, J. This is clearly within the words of 6 & 7 Vict. c. 65. If the legislature had wanted to exemplify their meaning, they could hardly have done so more aptly than by inserting in the schedule a drawing of this brick. It may be doubtful whether it is the subject of a patent. We cannot, for that reason, take it out of the plain words of the statute.]

The intention of the statute must be looked to.

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PATTESON, J. I thought at the trial that the invention consisted in the shape and configuration, and on that the utility was rested. Therefore, although it would not be within the 5 & 6 Vict. c. 100, it would come within the 6 & 7 Vict. c. 65, which extends to purposes of utility as well as of ornament. What the defendant's counsel has said only shows what the purposes of utility are. The plaintiffs have registered the shape and configuration of their brick. It is not necessary to decide how far this was a new manufacture, and the subject of a patent, as I think the plaintiffs had a clear right to avail themselves of registration under the statute.

COLERIDGE, J. It cannot be doubted that this is within the words of the statute, and, I should say, it is also within its meaning. That could not be disputed except for the doubt suggested, that this is the subject of a patent. But even supposing this to be a new manufacture, I do not see that we should be right in cutting down the plain meaning of the statute, and holding that it could not be registered. I can quite understand a man preferring not to go to the expense of taking out a patent, but getting his invention registered for a shorter period, and I think he may be entitled to do this. However, I give no opinion on the point whether this was or was not the subject of a patent.

WIGHTMAN, J. The plaintiff's invention appears to be precisely within the words and meaning of the 6 & 7 Vict. c. 65. The novelty which he claims to have invented is in the shape and configuration of an ancient manufacture called a brick.

ERLE, J. Supposing this to be a subject of a patent, as to which I say nothing, I do not see why an inventor should not have a concurrent right to register his invention. We ought not to alter the plain meaning of the statute. — *Rule discharged.*

REGINA v. THE CLERK OF THE PEACE OF THE WEST RIDING
OF YORKSHIRE.¹

November 9, 1850.

*Lunatic — Criminal — 1 & 2 Vict. c. 14 — Adjudication of Settlement.
— Jurisdiction — Appeal — Service of Notice of Chargeability, &c.*

By 1 & 2 Vict. c. 14, s. 2, where any person is apprehended under circumstances denoting a derangement of mind and a purpose of committing a crime for which, if committed, he would be liable to be indicted, two justices of the county in which such person is apprehended, on proof that he is insane or a dangerous idiot, may by an order cause such per-

¹ 20 LAW J. Rep. (N. S.) M. C. 1.

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son to be conveyed to the county Lunatic Asylum, "and it shall be lawful for the said justices to inquire into and ascertain, by the best legal evidence that can be procured under the circumstances of personal legal disability of such insane person or dangerous idiot, the place of the last legal settlement of such person," and to make an order on the overseers of the parish where they adjudge him to be settled, for the costs of examining and conveying him to the asylum, and of his maintenance in the asylum; "and where such place of settlement cannot be ascertained, such order shall be made up on the treasurer of the county, &c., where such person shall have been apprehended:—"

Held, that the jurisdiction of the two justices to inquire into the settlement of the lunatic was not limited to the time of making the order by which he was conveyed to the asylum, but might be exercised at any subsequent time; and that no order could be made on the county for the expenses, until they had inquired into and failed to ascertain the place of settlement.

By sect. 3 of the same act, an appeal is given to the overseers, &c., of the parish in which the justices shall adjudge any such insane person to be settled, "in like manner and under like restrictions and regulations as against any order of removal," giving reasonable notice to the clerk of the peace of the county, &c., who is to be respondent in such appeal.

Held, that these provisions come into operation only when an appeal has been commenced; and that, therefore, the keeper of the asylum was a proper person to serve the notice of chargeability and other documents required by the Poor Law Acts to be sent to the overseers of the parish to be affected by the order of adjudication of settlement.

On an appeal, by the overseers of the poor of the township of Sharlestone, in the West Riding of Yorkshire, against the following order, the Quarter Sessions for the West Riding quashed the order, subject to the opinion of this Court upon the following case:—

"West Riding of Yorkshire. — To the overseers of the poor of the township of Sharlestone, in the West Riding of the county of York, and to the superintendent and treasurer of the Lunatic Asylum at Stanley-cum-Wrenthorpe, in and for the West Riding of the county of York, and to G. H., of, &c., constable. — Whereas, on this 5th day of March, 1849, C. Corsellis, superintendent and treasurer of the Lunatic Asylum of the West Riding of York, situate at, &c., complains to us, J. H. and E. T., two of her Majesty's Justices of the Peace in and for the said riding, &c., and gives us to be informed that heretofore, to wit, on the 1st of January, 1849, at Foulby, in the district of Nostell and Foulby, in the said riding, S. Attack, then of Foulby aforesaid, laborer, was discovered and apprehended, under circumstances that then and there denoted derangement of his mind, and a purpose of committing a crime for which, if then committed by the said S. Attack, he would then by law have been liable to be indicted, that is to say, the crime of, &c.; the said S. Attack was then, on, &c., at Wakefield, in the said riding, brought before us, the said Justices, and that we did then and there call to our assistance one B. K., a surgeon at Wakefield, aforesaid, and did then and there view and examine the said S. Attack, so apprehended and in custody as aforesaid, and then and there, upon such view and examination as aforesaid, were satisfied that the said S. Attack was then insane, and so thinking fit, did, by an order under our hands and seals, directed to the said G. H., who then was the constable of the peace where the said S. Attack was apprehended as aforesaid, &c., cause the said S. Attack to be conveyed to and placed in the said asylum, pursuant to the

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statute, &c.; and that the said S. Attack was, pursuant to the said order on, &c., conveyed to and placed in the said asylum, and was thereupon then received into the said asylum, wherein he has been ever since then, until now, and still is confined and in custody, pursuant to law, and under the said order; and that when he was so received therein, he was, and thence until now has been, and yet is, an insane person; and that the said S. Attack is a poor person, and without any means of his own, or of his relations or friends, applicable to or available for or towards his maintenance in the said asylum; and that we, the said Justices, have not hitherto inquired into and ascertained the place of the last legal settlement of the said S. Attack, nor has any order been made for payment of any sum for his maintenance therein; and that the place of the last legal settlement of the said S. Attack, from the time of his discovery and apprehension as aforesaid until now, has been and now is in the township of Sharlestone, in the said riding; and that the said reasonable charges amount to the sum of 1*l.* 16*s.*, and are now due and payable to the said G. H., the said constable; and that the reasonable cost of the maintenance of the said S. Attack, in the said asylum, amounts to the sum of 7*s.* 6*d.* a week; and that he, the said C. Corsallis, is the superintendent and treasurer of the said asylum, and the person to whom the said sum of 7*s.* 6*d.* a week ought to be paid; and that the said asylum is the Riding Lunatic Asylum of the said West Riding, and was, on, &c., and still is situated in and belonging to the said riding. Now, therefore, we, the said first-mentioned Justices, having, on the hearing of the said complaint and information, inquired into and ascertained the place of the last legal settlement of the said S. Attack, by the best legal evidence that can be procured under the circumstances of personal legal disability of the said S. Attack, that is to say, by satisfactory evidence, upon oath and otherwise, according to law, do, by this our order, adjudge that the place of the last legal settlement of the said S. Attack, during all the time aforesaid, has been and still is the said township of Sharlestone, and that all and singular the premises hereinbefore and in the said complaint and information set forth, are true. And we do thereupon hereby order you, the overseers of the poor of the said township of Sharlestone, on behalf of your said township, to pay to the said G. H., the said constable, the said sum of 1*l.* 16*s.*, which it has been proved to our satisfaction, upon oath, on the said hearing, is the amount of the reasonable charges that have been incurred and paid by the said G. H., the said constable, for examining the said S. Attack, and conveying him to the said asylum, as aforesaid. And we do hereby further order you, the said overseers of the poor of the said township of Sharlestone, to pay, on behalf of your said township, to the said C. Corsallis, the superintendent and treasurer of the said asylum, weekly and every week, the sum of 7*s.* 6*d.*, it having been proved to our satisfaction, on oath, on the said hearing, that the same is a reasonable charge in that behalf, for the maintenance of the said S. Attack in the said asylum, during his confinement therein, under and by virtue of our said order, in that behalf made, on, &c., or until it shall be otherwise ordered according to law.

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And we do further order you to make the first of the said weekly payments on, &c., for the week then ensuing. Given under our hands and seals, at Wakefield, in the said West Riding, this 5th day of March, A. D. 1849.

“J. H. (L. s.)

“E. T. (L. s.)”

S. Attack, the insane person in the said order mentioned, was, on the 1st of January, 1849, brought before J. H. and E. T., the two Justices who made the order, on a warrant charging him with assault; when it clearly appeared to the said Justices that he had been discovered and apprehended under circumstances that denoted a derangement of mind, and a purpose of committing some crime, for which, if committed, he would have been liable to be indicted. The said Justices thereupon called to their assistance B. K., a surgeon, and being, upon view and examination of the said S. Attack, and on other proof, satisfied that the said S. Attack was insane, made an order, dated the 1st of January, 1849, addressed to G. H., the said constable, which stated the above facts, and commanded him to convey the said S. Attack to the before-mentioned asylum, and the superintendent of the same to receive him. At that time the settlement of the said S. Attack was not known or inquired into or ascertained, nor was the subject at all brought before the Justices by any one, nor was any one interested therein summoned or brought before the said Justices, and no adjournment for that or any purpose was applied for or took place. Under the said last-mentioned order, the said S. Attack was at once taken by the constable of Nostell and Foulby to the Lunatic Asylum for the West Riding, and with the said order, on the same day, there delivered to and received by C. Corsellis, the superintendent and treasurer of the said asylum. On the 5th of March, 1849, on the application and complaint of the said C. Corsellis, as such superintendent and treasurer, to the said J. H. and E. T., the same Justices who made the said order of the 1st of January, they, the said Justices, made the order of settlement and maintenance firstly herein-before set out. Up to that time, the settlement had not been inquired into or ascertained by any Justices.

The said C. Corsellis sent to the overseers of Sharlestone a copy of the said order of the 5th of March, 1849, and of the examinations and evidence on which the same was made, and also a statement in writing, under his hand, setting forth the grounds of his application and complaint, and of the said first-mentioned order, including the particulars of the settlement relied upon in support thereof, and with them a notice of chargeability signed by him. The overseers of Sharlestone served notice and grounds of appeal on the clerk of the peace of the West Riding, and under the said grounds of appeal were entitled to take the objections hereinafter mentioned.

On the trial of the said appeal, it was, and is now, admitted by the appellants that the said S. Attack was a proper person to be confined in the Lunatic Asylum; but it was contended by them, first, that the said C. Corsellis had no authority, as superintendent and treasurer of the said asylum, to complain to the Justices, or to sign, give, or send

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the documents hereinbefore mentioned to the overseers of Sharlestone. The appellants took this as an objection in substance to the proceedings, not making any to the form of any of the documents, which, except on this ground, are to be considered good. Secondly, the appellants objected that the Justices, though the same who made the order of the 1st of January, had no jurisdiction to make that of the 5th of March, as the settlement should have been inquired into at the time the order of the 1st of January was made, or that an adjournment should have taken place with a view to such inquiry; that neither an inquiry nor adjournment having taken place on the 1st of January, the said Justices should then have made an order of maintenance on the treasurer of the West Riding of Yorkshire, but that at all events they had no jurisdiction to commence a new inquiry subsequently into the settlement of the said S. Attack.

On both of these objections the Court of Quarter Sessions ruled in favor of the appellants, subject to the opinion of the Court of Queen's Bench. If the Court should be of opinion that either of the objections ought to have prevailed, then the order of Sessions was to be confirmed; if otherwise, the order of Sessions was to be quashed, and the original order confirmed.

Pashley and Pickering, in support of the order of Sessions. The first objection to this order is, that the superintendent of the Lunatic Asylum was not the proper person to send the copies of the examinations, and the other documents required to be sent under the Poor Law Acts, the provisions of which as to appeals are incorporated in the act now in question. The 1 & 2 Vict. c. 14, s. 2, provides that the clerk of the peace, and not the keeper of the asylum, is to be respondent; he, therefore, should have served these documents.

[ERLE, J. The respondent is only a consequence of the appeal.]

The necessary documents should have been sent by the party who subsequently becomes the respondent. How can it be right that the respondent should be bound by an issue which he has never raised? And it would not be fair to saddle the county with the expense of maintaining the lunatic because the keeper of the asylum had sent insufficient particulars of the settlement. If the order is served by a wrong party, the only mode of getting rid of it is by appeal, as it is voidable, not void. It is like the case where a notice of chargeability is sent, signed by one overseer only; there it can only be avoided by appeal. *The Queen v. Westbury*, 5 Q. B. Rep. 500, and *The Queen v. The Justices of the West Riding*, 13 Law J. Rep. (N. S.) M. C. 39.

[COLERIDGE, J. The present case is put as one of service by a mere stranger.]

Still, as the order is valid on its face, it must be appealed against. *The Queen v. The Justices of Middlesex*, 5 Dowl. & L. P. C. 9; s. c. 16 Law J. Rep. (N. S.) M. C. 109, and *The Queen v. The Justices of Glamorganshire*, 18 Law J. Rep. (N. S.) M. C. 118, show that all the regulations of the Poor Law Acts are imported into proceedings under these Lunatic Acts. Secondly, as to the main point in the case. The Justices had no power to inquire into the settlement of the luna-

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tic at any time subsequent to his being sent to the asylum, at which time the county became charged with his maintenance in consequence of his settlement not being ascertained. By 1 & 2 Vict. c. 14, s. 2, a criminal lunatic may be sent, by an order of two Justices, to an asylum, and "it shall be lawful for the said Justices to inquire into and ascertain, by the best legal evidence that can be procured under the circumstances of personal legal disability of such insane person, &c., the place of the last legal settlement of such person," and "such two Justices" are empowered to make an order on the parish where they adjudge the lunatic to be settled for the reasonable charges of his examination and conveyance to the asylum, and also for a weekly sum as costs of his maintenance in the asylum; and the section proceeds, "and where such place of settlement *cannot be ascertained*, such order shall be made upon the treasurer of the county, &c., where such person shall have been in custody or apprehended." Unless the statutory provisions are complied with, no order can be good.

[LORD CAMPBELL, C. J. How can it be said that the place of settlement cannot be ascertained until some attempt to ascertain it has been made?]

The leading object of the statute is to secure an order for maintenance on some person or persons in the first instance; and if the settlement is not ascertained when the lunatic is sent to the asylum so as to warrant an order on the parish of settlement, the county becomes charged with the expenses, and no inquiry at a subsequent time can take off that liability which has attached. *The Queen v. Darton*, 12 Ad. & E. 78; s. c. 9 Law. J. Rep. (N. S.) M. C. 78, and *The Queen v. Heyop*, 8 Q. B. Rep. 547; s. c. 15 Law J. Rep. (N. S.) M. C. 70.

[ERLE, J. Then, if at the moment when a dangerous lunatic is captured, none of the bystanders happens to know where he is settled, no adjudication can be made afterwards though the settlement is perfectly clear?]

Not after he has been conveyed to the asylum. The power to give costs of maintenance contained in this statute does not extend to *past* maintenance; thereby showing that it was not contemplated that the order would be made after the lunatic had been removed to the asylum. The keeper of the asylum cannot be bound to receive the lunatic, if nobody is bound to pay for him. No difficulty can arise from requiring this order to be made in the first instance, and if the settlement cannot be ascertained at the moment, the inquiry may be adjourned, and the lunatic may be detained in safe custody during the adjournment.

[LORD CAMPBELL, C. J. What power have the Justices to detain him?]

They may do so either at common law or by virtue of the statute, for it would be during the inquiry.

[WIGHTMAN, J. Who would be liable to pay the costs of keeping the lunatic meanwhile?]

They might be recovered as parcel of the expenses of the examina-

tion. At all events, this presents no greater difficulty than ordering the past maintenance in the asylum, as must be contended for on the other side.

[LORD CAMPBELL, C. J. The "charges of examining" apply to the view and examination by the Justices and medical man before mentioned, and not to an inquiry into the settlement.]

There are no words in this act giving power to the Justices to inquire into the settlement from time to time, as in 8 & 9 Vict. c. 126, and some other statutes relating to lunatics; and therefore an argument is raised, that it was intended to limit the inquiry in point of time. The 8 & 9 Vict. c. 126, does not apply to criminal lunatics, so as to extend the provisions of 1 & 2 Vict. c. 14.

Overend and *Hardy* were not called upon to support the rule.

LORD CAMPBELL, C. J. The first objection has been sufficiently answered by the observations of the Court during the argument. The main question is, whether the magistrates had jurisdiction to make this order on the 5th of March; and on a just construction of the statute 1 & 2 Vict. c. 14, I think they had. The words of sect. 2 are very clear: they give power to the said two Justices, that is, the same who have sent the lunatic to the asylum, to inquire into and ascertain, by the best legal evidence that can be procured under the circumstances of personal legal disability of such insane person or dangerous idiot, the place of the last legal settlement of such person. This inquiry is not confined to any particular moment of time; but it is further provided, that "where such place of settlement cannot be ascertained," an order shall be made on the county where such person was apprehended. Now, here the jurisdiction of the Justices never had been exercised, because they never had inquired. It would lead to great inconvenience if, no inquiry having been made at the time of sending to the asylum, none could afterwards be made. The county could not be fixed, because it would not be a case where the settlement could not be ascertained; and the parish could not be fixed, because no settlement would have been ascertained. Besides, it can hardly be supposed that the legislature would enact any thing so unreasonable as that the moment a dangerous lunatic is brought before the Justices, they must, *eo instanti*, adjudicate on his settlement, without any means of inquiring, and make an order on the county, whereby the parish is permanently discharged, in case they cannot then and there ascertain the settlement. The words of the statute admit of the more reasonable construction, that this may be done at a future time. Therefore, neither of the objections raised should prevail, and the order of Sessions must be quashed.

COLERIDGE, J. The first objection is, that the treasurer or keeper of the asylum had no right to complain or send the documents required by the Poor Law Act. It is admitted that, except for this

objection, the documents are perfectly regular, and it is therefore an objection merely to the form of proceeding, and we must see clearly that some statute makes it necessary that these documents should be sent by the clerk of the peace, who is to be the future respondent. The statute 1 & 2 Vict. c. 14, says nothing as to what is to be done on the part of the persons who seek to charge the parish; the provision is, merely that the appeal is to be under like conditions and restrictions as an appeal against an order of removal. That affects the appellants only, who, in point of fact as well as of form, are bound to comply with those conditions. As to the second and more important point, we must construe the statute as we should do the day after it passed. In so doing, the argument drawn from the different language of subsequent acts cannot arise. But it by no means follows, that because general words are used in this act, they may not have the same construction as the more particular words found in the new Lunatic Act. The only restraint imposed by the language of the 1 & 2 Vict. c. 14, is, that the same two Justices who make the order for removing the lunatic to the asylum must ascertain the settlement. It is said that this leads to the inference, that these acts must be done at once, or, at all events, with only an adjournment. But if the words are large enough (as I think they are) to admit of a different construction, we cannot restrain them in the way proposed, when we consider the vast inconvenience which would here result from our so doing.

WIGHTMAN, J. I am of the same opinion on both points. As to the first, I will not repeat the reasons already given. With respect to the second objection, as to the jurisdiction of the magistrates, the provision is, that if, on an inquiry into the settlement, it is ascertained, an order is to be made immediately on the parish; if it cannot be ascertained, the order is to be made on the county; and the argument raised is, that the inquiry must take place at the time of making the order sending the lunatic to the asylum. That would produce so much inconvenience, that, unless the words imperatively require such a construction, we ought not to adopt it. The question may arise when there are no means of inquiring at the time into the settlement, though it may be necessary to convey the lunatic at once to the asylum. Therefore, unless we are forced by precise words, we ought not to agree to the argument contended for by the appellants. I find no such words; and, therefore, the order is good, and the decision of the Sessions wrong.

ERLE, J. It is clear that the analogy to appeals against orders of removal is to be followed, so far as it can be. Now, adopting the provision in the Poor Law Act, the party to be benefited by the order is the party who ought to take steps to enforce it. The keeper of the asylum at whose expense the lunatic is maintained until some order of maintenance is made, is, according to analogy, the party to send the requisite documents to the overseers of the parish charged by the order. The provisions according to which the appeal is to be conducted come into operation as soon as the appeal begins, but not

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before; and there is a provision that the clerk of the peace, and not the party who sends the documents, is to be the respondent in the appeal. As to the second point, the words of the act are not confined, as is contended for by the appellants, but they allow an inquiry at a future period; and certainly convenience requires that this should be so. — *Order of Sessions quashed.*

In re THE OVERSEERS OF CHEDGRAVE.¹

November 11, 1850.

*Maintenance, Costs of — Suspended Order — 4 & 5 Will. 4,
c. 74, s. 84.*

The costs of maintenance of a pauper, while remaining in a parish under a suspended order of removal, may be recovered against the parish to which he is adjudged to belong, by an order of two justices, under sect. 84 of stat. 4 & 5 Will. 4, c. 76.

A RULE had been obtained, calling upon two Justices of the Peace for the county of Norfolk, and also on the overseers of Chedgrave, in that county, to show cause why an order should not be made by the said Justices, commanding the late or present overseers of Chedgrave to pay to the overseers of the parish of Barford, in the same county, the sum of 97*l.* 5*s.*, for the costs incurred by the said parish of Barford, by reason of the suspension of an order of removal from Barford to Chedgrave of J. H. Gower and his wife and children.

The circumstances out of which this motion arose appear in *The Queen v. Chedgrave*, 12 Q. B. Rep. 206; s. c. 19 Law J. Rep. (N. S.) M. C. 54, in which this Court decided that the pauper having, since the making and suspension of the order of removal, become irremovable under the 9 & 10 Vict. c. 66, an order for the costs occasioned by the suspension could not be supported under 35 Geo. 3, c. 101, and 49 Geo. 3, c. 124, because the pauper was neither dead nor removed. The present rule was founded on the 4 & 5 Will. 4, c. 76, s. 84. Notice, and a copy of the order of removal, and a copy of the examination upon which the order was made, were given to the overseers of Barford within ten days of the order being made.

Archbold now showed cause. The 4 & 5 Will. 4, c. 76, s. 84, provides that "the parish to which any poor person, whose settlement shall be in question at the time of granting relief, shall be admitted, or finally adjudged to belong, shall be chargeable with and liable to pay the cost and expense of the relief and maintenance of such poor person; and such cost and expense may be recovered against such parish in the same manner as any penalties and forfeitures are by this act recoverable. Provided always, that no charges or expenses of relief

¹ 20 Law J. Rep. (N. S.) M. C. 23. 14 Jur. 1092.

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or maintenance shall be recoverable under a suspended order of removal, unless notice of such order of removal, with a copy of the same, and of the examination upon which such order was made, shall have been given within ten days of such order being made to the overseers of the poor of the parish to whom such order is directed." There are two objections to this section applying: first, it does not repeal the express provision of the 35 Geo. 3, c. 101, as to costs of suspended orders, which it expressly recognizes in the proviso; and therefore such costs cannot be given in any other cases than under the old act. The two acts, being part of the same code, must be read together, and the latter will not repeal the former, except by express words or necessary implication. Per Lord Mansfield, in *The Earl of Ailesbury v. Pattison*, 1 Dougl. 30.

[ERLE, J. May not the latter provision be cumulative? The former act does not say that costs shall only be given in case of death or removal.]

The King v. The Poor Law Commissioners, in re St. Pancras, 6 Ad. & E. 1; s. c. 6 Law J. Rep. (N. S.) M. C. 41, is in point. But, secondly, the 4 & 5 Will. 4, c. 76, s. 84, does not at all apply to costs occasioned by superseding an order. That section was introduced solely for the purpose of providing for the costs incurred during the twenty-one days, or the time through which an appeal extended. Before that act, no such costs could be incurred, for there was no grievance against which an appeal would lie until the pauper was removed; but the appeal being given against the service of the order, it was necessary to provide for those costs. Besides, the costs contemplated by that section can only be given by the Quarter Sessions who hear the appeal.

[COLERIDGE, J. That cannot be so where the settlement is admitted; and, moreover, they are to be recovered in the same way as penalties and forfeitures, which is, by sect. 101, by conviction by two Justices.]

Palmer and Worlledge were not called upon to support the rule.

LORD CAMPBELL, C. J. This case clearly falls within 4 & 5 Will. 4, c. 76, s. 84, which applies to suspended orders of removal as well as others. The conditions required by the 35 Geo. 3, c. 101, have now been fulfilled; the pauper has been removed and is at Chedgrave, and there is nothing in the later act which is inconsistent with the provisions of the prior statute.

COLERIDGE, J. It is admitted that if this case were governed by sect. 84 in its ordinary meaning, the order for costs ought to be made. But it is argued that the section must be restricted to the costs which have been incurred during the twenty-one days after the service of the order. I see no ground for so restraining it. The settlement of these paupers is clearly in Chedgrave. An order was made and suspended, and in the interval the statute, 9 & 10 Vict. c. 66, passed, which made them irremovable; but it did not alter their settlement. We held in the former case that the removal was wrong-

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ful; but that the right to appeal was lost by the party's own laches. But the paupers were in fact removed to the place where their settlement was adjudged to be; if so, the case is within sect. 84 of 4 & 5 Will. 4, c. 76. If that clause does not apply to suspended orders, I see no meaning in the proviso; and looking to that proviso, it is clear that all the terms required by it have been complied with.

WIGHTMAN, J., and ERLE, J., concurred. — *Rule absolute.*

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November 9, 1850.

Ratability — Liability to Poor Rate — Commissioners for making Improvements — 4 Vict. c. 16 — Public Pump-Room — Beneficial Occupation — Purposes of Local Act — Public and Private Advantage.

Under an act, 4 Vict. c. 16, Commissioners were appointed for the improvement of H., within certain limits, containing parts of several townships; and the property in all the public wells or springs of medicinal or mineral waters, within the said limits, was vested in the said Commissioners, and they were empowered to add to or alter the existing erections over the said springs, and to erect a pump-room over the sulphur water springs. The act also gave them special powers with reference to the maintaining of footways, the obstruction, cleansing, and lighting of the streets, the removal of dirt and rubbish from houses and premises, the preventing of nuisances, the providing a proper market, and further empowered them to make annual rates upon the owners of property within the limits of the act; the money arising therefrom, as also all other moneys received under the act, to be applied entirely in paying off all moneys borrowed on the rates, and defraying the expenses incurred in carrying out the purposes of the act. A pump-room was afterwards built, under the power for that purpose given by the act, which was open to, and used by, the public generally, subject only to a small payment to the Commissioners, and certain other regulations imposed by the act: —

Held, that the Commissioners were properly rated as occupiers and owners of such pump-room, to the relief of the poor of one of the townships in part within the limits of the act, the purposes for which they were appointed not being for the public advantage only.

THIS was an appeal by the Commissioners of High and Low Harrogate against a rate made for the relief of the poor of the township of Pannal, in the West Riding of York, bearing date the 28th of June, 1849. The Quarter Sessions had confirmed the rate upon appeal, subject to the opinion of this Court on the following case: —

The rate in question was laid upon the Commissioners as occupiers and owners of a pump-room, situate in the township of Pannal, built under the powers of an act of the 4 Vict. c. 16, under which also the Commissioners are constituted for carrying the act into execution. It is a public act, and to be considered part of the case.²

¹ 20 Law J. Rep. (N. S.) M. C. 25.

² The following are the more material sections of the act: —

70. *And be it enacted*, That all the money which shall be raised on the credit of the rates hereby authorized to be levied or raised or collected by virtue of this act shall

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The pump-room was built in 1842, and has ever since been open to and used by the public, on the terms specified by the 89th section of the said act, and every person has been entitled to use it on those terms. By the 88th section of the said act, provision is made for a free pump outside the pump-room, and such free pump was made

be applied, in the first place, in paying the expenses of obtaining and passing this act, or incident thereto, and afterwards in making such permanent improvements within the limits of this act as are hereby authorized, and as the Commissioners shall direct to be made.

87. *And be it enacted*, That for better protecting all the public wells or springs of medicinal or mineral waters now or hereafter to be discovered, situate contiguous to or within or upon the stray, or two hundred acres of waste land, hereinbefore mentioned in the townships of Bilton-with-Harrogate and Pannal aforesaid, and securing the same from being destroyed, polluted, or injured, and controlling the superintendence and usage thereof, the same shall be deemed to be the property of, and are hereby vested in, the Commissioners for the time being, appointed by virtue of this act, and who are hereby empowered, by their clerk, to bring any action, or prefer any bill of indictment or information, as the case shall require, against any person who shall do any act that may destroy, pollute, or injure the said wells or springs, or any building, erection, cistern, reservoir, or apparatus in any way connected therewith, and either now or hereafter erected or placed for the better protection and preservation of the said wells or springs.

88. *And be it enacted*, That for the purpose of securing a larger and better supply of sulphur water from the old sulphur water springs at Low Harrogate aforesaid, and for protecting and securing them, and all other the wells or springs aforesaid, from destruction, pollution, and injury, and for affording greater convenience and accommodation to the visitors resorting to Harrogate for the benefit of the said waters, it shall be lawful for the Commissioners to make such additions or alterations to the present erections over all or any of the said springs, or to the basins or reservoirs thereto belonging, and to erect a pump-room or other building over the said sulphur water springs, with suitable basins, cisterns, reservoirs, pumps, and apparatus, and to lock up or otherwise secure all or any of the said wells, basins, or pumps from ten o'clock every evening until half past five on the following morning: Provided always, that, for the purpose of affording free access to all persons whomsoever resorting to the said wells for the purpose of drinking the said mineral waters, free from any charge whatever, between the hours of half past five o'clock in the morning and ten o'clock at night, if the said sulphur water wells shall be enclosed, and a pump-room or other building erected over the same, the Commissioners shall in that case cause to be erected, and at all times thereafter kept in good repair, a pump with a conducting pipe inserted into the principal basin or reservoir of the said sulphur water spring or springs, to be placed outside of any such pump-room or other buildings, so as from time to time, and at all times thereafter, within the hours last aforesaid, to allow water to be obtained therefrom with the same facility and in as pure a state as the same is obtained in or from the said pump-room; but no bottling of water shall be allowed at the said sulphur water wells or pump earlier than eleven o'clock in the morning nor later than ten o'clock at night, and no water shall be drawn from the old sulphur water wells for the purpose of being taken away in barrels or similar large vessels, except the surplus or waste water that shall run or be conveyed into a reservoir provided for collecting bathing water.

89. *And be it enacted*, That it shall be lawful for the Commissioners to cause to be levied, from the persons using or frequenting the said pump-room or other erections over the said wells or springs, a reasonable charge, not exceeding in the whole the sum of 1s. 6d. per week for each person, such charge being according to a printed scale, which shall at all times remain hung up in the said pump-room or other erections, for inspection by those frequenting the same.

95. *And be it enacted*, That it shall be lawful for the Commissioners to flag or make, with such materials as they shall think fit, any causeways or footways for the use of foot passengers in or on the sides of any street within the limits of this act.

96. *And be it enacted*, That all causeways or footways within the limits of this act,

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when the pump-room was built, and has always since been used by those who desired it without any payment whatsoever by them. Ever since the opening of the pump-room, the Commissioners have held it in their own hands, except for about two years next before the making of the said rate, when it was let at a yearly rental of 445*l*.

whether made by the Commissioners or otherwise, which the Commissioners shall deem necessary to be kept up by themselves under the provisions of this act, shall be kept in repair by the Commissioners.

98. *And be it enacted*, That it shall be lawful for the Commissioners from time to time to cause such common sewers, drains, vaults, culverts, watercourses, wells, and pumps as they may think necessary, to be constructed in or under any street within the limits of this act; and also to cause any of the common sewers, drains, vaults, culverts, and watercourses, public wells or pumps, which now are or hereafter shall be within the same, to be altered, repaired, cleansed, and completed, as to them shall seem necessary, and to carry and continue the same into and through any lands within the limits of this act.

102. *And be it enacted*, That it shall be lawful for the Commissioners from time to time to cause the houses and buildings in the streets within the limits of this act to be numbered, and to cause to be affixed or painted, in a conspicuous part of some house, building, or place at or near each end, corner, or entrance of every such street, the name by which such street is to be known; and if any person shall destroy, pull down, or deface any such number or name, or shall put up any number or name different to the number or name put up by the Commissioners, he shall forfeit a sum not exceeding 40*s*. for every such offence.

103. *And be it enacted*, That if the Commissioners shall consider any porch, shed, projecting window, step, cellar, cellar door or window, sign, sign post, sign iron, show board, window shutter, wall, gate, or fence, or any other obstruction or projection hereafter to be placed against or in front of any house or building, to be an annoyance in consequence of the same projecting into, endangering, or rendering less commodious the passage along any street within the limits of this act, it shall be lawful for them to give notice in writing to the owner or occupier of such house or building to remove such obstruction or projection, or to alter the same in such manner as the Commissioners shall think fit; and such owner or occupier shall, within seven days after the service of such notice upon him, remove such obstruction or projection, or alter the same in such manner as shall have been directed by the Commissioners.

104. *And with regard to all obstructions or projections of a like kind as those before mentioned*, which have been erected or placed against or in front of any house in any street or public place before the passing of this act, *be it enacted*, That it shall be lawful for the Commissioners, if they shall consider any such obstruction or projection to be an annoyance in consequence of the same projecting into, endangering, or rendering less commodious the passage along any street within the limits of this act, to cause the same to be removed or altered as they shall think fit: Provided always, that the Commissioners shall give notice in writing of such intended removal or alteration to the owner or occupier against or in front of whose house or building such obstruction or projection shall be, fourteen days before such alteration or removal shall be commenced, and shall make reasonable compensation to every person who shall incur any loss or damage by such removal or alteration.

108. *And be it enacted*, That when any house or building, any part of which now projects beyond the regular line of the street, or beyond the front of the house or building on either side thereof in any street within the limits of this act, shall be taken down to be rebuilt or altered, the same shall be set back to the line of the street, or the line of the adjoining house or building, in such manner as the Commissioners shall direct for the improvement of such street; and when the next house or building shall not adjoin the house or building to be so taken down, but shall be separated therefrom, then the same shall be set back to the line of such street: Provided always, that the Commissioners shall make full compensation to any such owner for any loss or damage he may sustain in consequence of his house being set back according to the provisions herein contained.

119. *And be it enacted*, That if any building or excavation, or any land or place,

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to a Mr. Fletcher, as tenant to them. During his occupation, he was rated in respect of it; but neither before nor since his tenancy were the Commissioners ever rated, until the rate appealed against was made.

It is admitted that several of the townships included within the

contiguous to any street within the limits of this act, shall, for want of sufficient repair, protection, or enclosure, be dangerous to the passengers along such street, it shall be lawful for the Commissioners to cause the same to be repaired, protected, or enclosed, so as to prevent any danger therefrom; and the charges of such repair, protection, or enclosure shall be repaid to the Commissioners by the owner of the premises so repaired, protected, or enclosed.

123. *And be it enacted*, That it shall be lawful for the Commissioners from time to time to cause all or any of the streets within the limits of this act to be cleansed and watered, and the dirt, ashes, and rubbish, except any such as shall be reserved by the occupiers for their own use, to be removed from any house or premises within the limits of this act, at such time and in such manner as they shall appoint.

126. *And be it enacted*, That if any foundery, candle-house, melting-house, melting-place, or soap-house, hereafter to be erected or made, or any slaughter-house, boiling-house for offal, hog-sty, unenclosed or uncovered yard or place for the deposit or sifting of lime, necessary-house, dunghill, manure heap, or other offensive building, place, or matter, in or near any street within the limits of this act, shall be a nuisance to any inhabitant, it shall be lawful for the Commissioners, upon complaint made by any inhabitant, to inquire into the matter of such complaint; and if the Commissioners shall consider such building, place, or matter of which such complaint shall be made to be a nuisance, it shall be lawful for them, by notice in writing, to order the person by or on whose behalf such nuisance is carried on, kept, or made, to discontinue or remedy the same.

135. *And be it enacted*, That it shall be lawful for the Commissioners, with consent of a majority of the rate-payers assembled at an annual meeting for the settlement of accounts, to cause the several streets within the limits of this act, or such of them as they shall think proper, to be lighted with gas, oil, or otherwise, at such times as they shall think fit, and to provide such lamps, lamp posts, lamp irons, pipes, and other works as may be necessary for that purpose.

136. *And be it enacted*, That it shall be lawful for the Commissioners, or for any person or persons authorized by them, to build and provide, maintain and improve, one or more building or buildings, place or places, for the daily sale of flesh meat and other raw victuals, fish, poultry, game, fruit, vegetables, butter, and eggs, within the limits of this act, together with all stalls, standings, and other conveniences and suitable approaches for all persons resorting thereto: Provided always, That nothing herein contained shall empower the Commissioners or such person as aforesaid to hold any weekly market, or to expose for sale in or near such building or buildings, place or places, or within the limits of this act, any cattle, horses, live stock, corn, grain, or other articles except those before enumerated, and that the Commissioners or such person or persons as aforesaid acting contrary thereto shall for any such offence forfeit the sum of 40s., to be recovered in the manner hereinafter provided.

168. And in order to raise money for paying the expenses attendant upon obtaining this act, (after deducting therefrom the amount of any sums which may be obtained by subscription,) *be it enacted*, That it shall be lawful for the Commissioners, so soon after the passing of this act as they shall think fit, to make one or more equal rate or rates, assessment or assessments, to be signed by any seven or more of the said Commissioners, upon the owners or reputed owners of the said strays, and all lands, houses, shops, warehouses, coach-houses, cellars, buildings, gardens, and yards within the limits of this act, according to the annual value of the same respectively, as estimated in the several rates for the relief of the poor; and for carrying the several purposes of this act into execution, it shall be lawful for the Commissioners, once in every year after the passing of this act, or oftener if they shall think it necessary, the first year to be computed from the 6th day of April, 1842, to make one or more equal rate or rates, assessment or assessments, to be also signed by any seven or more of the said Commissioners, upon the tenants or occupiers of all houses, shops, warehouses,

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limits of the act, had been lighted with gas by a company, for which lighting the said gas company have been paid by the said Commissioners, and that the other purposes of the act had been carried out in each of the said townships, and that all moneys coming to their hands as Commissioners, either from the pump-room or any other source, have been applied throughout the whole of the townships and parts of townships included within the limits of the act, to the purposes specified in the act, and no others whatever; and neither the Commissioners as a body nor any of them personally have or has received, or do, or does, or can receive any profit, advantage, or benefit whatsoever from the moneys coming to their hands in virtue of their office. There are parts of several townships within the limit of the act and the jurisdiction of the Commissioners, but not the whole of any one. About one twentieth of the township of Pannal is included within those limits, but the said township of Pannal is several miles distant from other townships which are within the limits of the act.

On these facts the counsel for the appellants contended that the commissioners had no beneficial occupation of the pump-room, for that the profits were solely applicable to public purposes, and had been so applied. The Court of Quarter Sessions decided in favor of the respondents, that the purposes specified in the act were not public, so as to exempt the commissioners from such rate.

If the Court of Queen's Bench should be of opinion that they were right in so deciding, then the rate was to be confirmed, otherwise to be quashed.

Pashley and Overend, in support of the order of Sessions. The rate was properly confirmed, as the subject matter of it, viz., the pump-room, is beneficially occupied by the Commissioners, and their profits are not applied exclusively to public purposes, so as to exempt them from ratability. By the act, 4 Vict. c. 16, s. 87, the springs of mineral water are vested in the Commissioners thereby appointed; and by sect. 89, they are entitled to charge, at a rate not exceeding 1s. 6d. a week, each person frequenting the pump-room erected over the springs. Then, by sect. 102, the Commissioners are em-

coach-houses, cellars, buildings, gardens, and yards within the limits of this act, according to the annual value of the same, so as such rate or rates, assessment or assessments, do not exceed in the whole in any one year the sum of 1s. in the pound of such annual value as aforesaid, except as is next hereinafter provided.

178. *Provided always, and be it enacted*, That it shall be lawful for the occupiers of any ratable property to demand to be assessed for the same, and to pay the rates in respect thereof made under the authority of this act; and the commissioners shall assess every such occupier, so long as he shall duly pay the said rates.

193. *And be it enacted*, That the money which shall arise from the said rates, as also all other money to be received by the commissioners under this act, shall be applied, in the first place, in payment of the interest of all moneys borrowed on mortgage of the said rates and of the annuities granted by virtue of this act, and afterwards in defraying the expenses of flagging, cleansing, watering, draining, and watching the several streets within the limits of this act, and of improving the same, and carrying the several purposes of this act into execution, and in paying off the principal sums borrowed on the credit of the rates in such order as the commissioners shall direct.

powered to cause the houses, &c., in the streets *within the limits of the act* to be numbered, and the names to be painted up; and by sect. 107, if any houses in streets *within the limits of the act* are burnt or pulled down, the Commissioners may purchase the site of the houses, for the purpose of widening those streets, and by sect. 108, they may require houses which formerly projected into such streets to be rebuilt in the regular line for the improvement of the streets, making full compensation to the owner for any damage. The following clauses relate to other improvements which may be made to the portion of the townships within the limits of the act; but none of these provisions extend to the whole of any one of the townships, but only to certain portions included within the jurisdiction of the Commissioners. Therefore, the funds in the hands of the Commissioners are not applicable to a purpose exclusively public, but rather to the advantage of certain specified portions of the townships, and to individuals within the same. The preamble to the act also shows that such parts only of the several townships as are usually known as High Harrogate and Low Harrogate are intended to be benefited. This is not sufficient to exempt them from rates.

[LORD CAMPBELL, C. J. How do you define purposes strictly public?]

It may be difficult and dangerous to attempt to give a definition which will apply to all cases — *omnis definitio periculosa est in jure*. What is contended is, that this occupation is ratable within the principle laid down by decided cases; which is, that where any portion of the profits is applicable to purposes which may fairly be called private, the occupation is beneficial and the occupiers are ratable. *The Governors of the Poor of Bristol v. Wait*, 5 Ad. & E. 1; s. c. 5 Law J. Rep. (n. s.) M. C. 113, and *The Queen v. Wallingford Union*, 10 Ad. & E. 259; s. c. 8 Law J. Rep. (n. s.) M. C. 89, show that premises capable of a beneficial occupation are not exempted from ratability, because they are exclusively occupied by the poor of a parish. So, in *The King v. Badcock*, 6 Q. B. Rep. 787; s. c. *nom. The Queen v. The Trustees of Taunton Market*, 14 Law J. Rep. (n. s.) M. C. 58, trustees of a market-house, &c., the profits arising from which were ultimately to be applied for the benefit of the poor of a particular parish, were held liable to be rated. In those cases one class only of parishioners was benefited, and so the purposes were not wholly public. Here, the subject matter of the rate is situate in one township, but the benefit is to be enjoyed by a part only of the inhabitants of that and other townships, and is within the principle of these cases. *The King v. The Mayor, &c., of York*, 6 Ad. & E. 419; s. c. 6 Law J. Rep. (n. s.) M. C. 121. *The Queen v. Blackfriars Bridge, Manchester*, 9 Ad. & E. 828; s. c. 8 Law J. Rep. (n. s.) M. C. 29, and *The Queen v. The Church-wardens of Longwood*, 18 Law J. Rep. (n. s.) M. C. 65.

Pickering and Hardy, contra. The commissioners have no personal interest or advantage in the pump-room, and they have no discretion beyond that given by the provisions of the local act. All their

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duties, too, are of a public character. The preamble of the act is very material. It recites, amongst other things, that "the villages or places called High Harrogate and Low Harrogate have of late years considerably increased, and the number of visitors resorting thereto has also much increased, and it would be of great advantage to the inhabitants of those places, and to the public at large, if provisions were made for regulating, widening, or otherwise improving the streets, roads, lanes, and other public passages of the said villages, for establishing one or more markets therein, and for removing and preventing nuisances within such parts of the several townships of, &c., as are usually known or distinguished as High Harrogate and Low Harrogate, and parts adjacent thereto respectively." This shows clearly that public advantage was the object of the provisions in this act. The 104th section explained by the interpretation clause, and the 123d, 135th, and 136th sections, all provide for purposes by which the public is to be benefited. The pump-room is open to all the public, and the fact of payment being required does not make it less a place of public use. *The King v. The Commissioners of Salter's Load Sluice*, 4 Term Rep. 730. *The Queen v. The Church-wardens of Longwood* is quite a distinct case from the present. That case falls within the class of cases deciding that where the benefit is confined to a particular class of persons, it is not public in the sense that exempts from liability.

[LORD CAMPBELL, C. J. You must show that all the purposes of the act are for the public benefit. Now, the provision contained in the 123d section appears to be very much for the private advantage of the occupiers.]

That section really secures a benefit to the public at large. The power given is to remove any thing that may be prejudicial or a nuisance to the public, and private individuals are thereby prevented from keeping dirt and rubbish in places offensive to the public.

[LORD CAMPBELL, C. J. But is it not an advantage to the individual occupiers, that the removal of the dirt and rubbish should be made, without any trouble and expense to them?]

Yes. But such private advantage is merely ancillary to the public benefit; a private advantage of that kind, if a good ground for upholding the rate, might equally have been urged in *The King v. Beverley Gas Works*, 6 Ad. & E. 645; s. c. 6 Law J. Rep. (n. s.) M. C. 84. In *The Queen v. The Inhabitants of Exminster*, 12 Ad. & E. 2; s. c. 9 Law J. Rep. (n. s.) M. C. 108, and in *The King v. The Inhabitants of Liverpool*, 7 B. & C. 61; s. c. 5 Law J. Rep. M. C. 145, there was a material benefit to individuals, and yet a general public benefit was held to exempt from a liability to rates, and the same may be observed of the private advantages said to be provided by the several other sections of the act, upon which, *ex concessis*, this question turns.

[WIGHTMAN, J. Is there any clause showing to what purpose the fund derived from the pump-room is to be applied?]

Yes; the 193d. But, then, that section speaks generally of all the moneys to be received by the Commissioners, and consequently the matter comes back to the same question. The whole scope and

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object of the act is the public benefit, and, therefore, the Commissioners are not liable to be rated in respect of their occupation.

LORD CAMPBELL, C. J. I am of opinion that the order of Sessions must be confirmed. I confess that I have often regretted that property locally situated within a parish, which returns a profit, and which, in the hands of a private individual, is liable to be rated to the support of the poor, should be exempt from such rates, if devoted to a public purpose. I think, in reason, when devoted to a public purpose, it ought to remain subject to the charges under which it was held by the private owner before it was devoted to such purpose; and to permit the exemption is to allow the private owner to exercise his charity at the expense of others. But the law has been settled otherwise, and I do not seek to disturb it; at the same time, however, I would not extend the exemption that has been allowed. Now, it is not enough that the parties are merely trustees, deriving no personal advantage. It must be proved that the revenue derived from the property is entirely, and without any exception, applicable to public purposes. I do not desire to venture any definition beyond this. Then, can it be said, that all the purposes of the act to which the revenue is applicable are of a public nature? It appears to me that many of the purposes provided for by the local act are for the private advantage of the inhabitants of the district under the control of the Commissioners. As an instance, I refer to the 123d section, which clearly affords such an advantage to the occupiers of houses, and I cannot distinguish that from a section, if there had been one, providing that all buildings appearing dangerous might be removed by the Commissioners, out of the public fund. That might equally be said to be a public advantage, but it would, at the same time, be relieving individuals out of the fund from an obligation cast upon them by law. I think, therefore, this case does not fall within the principle of any of the cases in which an exemption from liability to be rated has been upheld.

COLERIDGE, J. I am of the same opinion. Here the property is in itself ratable. In its present condition it makes a return of value, and if it were in the hands of a lessee, he would have to pay rates in respect of it. The present occupiers say they ought not to be rated, and it is for them to establish an exemption from the rate. It is conceded that they will not succeed by showing that they, individually, derived no profit from the property; nor will they succeed by showing that the public had some portion of the *direct* benefit under the act. (I use the word "direct," in order to meet the argument as to ancillary benefit.) The question is, whether they show that the public has all the advantages under the provisions of the act, for without that the exemption is not made out. An attempt has been made to get a definition of what is to be considered public purposes. It would, perhaps, be a difficult thing to draw a line by which every case could be tried. But, I think, the facts are sufficiently on one side for the decision of this case. In *The Queen v. Badcock*, it was held not

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enough that the benefit should be for the rate-payers, or inhabitants, of a part of the district, out of which the rates were raised. Here, the preamble of the act points out the true distinction. It states that "it would be of great advantage to the inhabitants of High and Low Harrogate, and to the public at large," &c., showing that *some* only of the benefit intended is for the public; and I cannot help seeing that several of the provisions in the act are for the advantage of the inhabitants of a part of an entire district, and that seems to me to put an end to the claim of exemption.

WIGHTMAN, J. I am of the same opinion, upon this short ground, that the property produces a profit not applicable to public purposes entirely, but also to some purposes essentially private.

ERLE, J. I am also of the same opinion. The main purpose of the act is the convenience of the inhabitants, and the pecuniary improvements of the property within the district. The purpose recited of making Harrogate convenient to visitors carries with it the accompanying purpose of raising the value of the property; and when the whole of the provisions of the act are looked to, it appears clear that they are greatly for the convenience and profit of the district of High and Low Harrogate; and therefore, I think, the Commissioners ought not to be exempt from liability to the poor-rates, and that the order of Sessions is valid. — *Order of Sessions confirmed.*

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Queen's Bench Bail Court, November 11, 1850.

Articles of the Peace — Bodily Fear — Partners — Danger in particular Place.

Where one partner by violence forces his copartner out of the business premises of the firm, and threatens such copartner with violence and danger to his life if the latter should venture again to enter the premises, and it is necessary for such copartner to enter and use the premises for the purposes of carrying on his ordinary business as partner, the Court will permit the latter to exhibit articles of the peace against the former.

THIS was an application, made by one Thomas Gray, to exhibit articles of the peace against one John Mallinson.

The articles of the peace stated, that in March, 1850, it was agreed between Gray and Mallinson, that Gray should give up his business of a spinner, at Glasgow, and enter into partnership with Mallinson, who was a woollen cloth merchant at Huddersfield, and that the business should be carried on in the name of Mallinson only; that, in the April following, Gray entered upon the duties of his partnership, and from that time until October attended at the warehouse and

¹ 20 Law J. Rep. (N. S.) M. C. 33.

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counting-house of Mallinson, and acted therein as partner, except when absent, engaged in travelling; that, on the afternoon of the 14th of October, (some angry correspondence having taken place between them previously,) Gray went down into the counting-house, where Mallinson was; that Mallinson then ordered him to leave the premises; that, on his declining to do so, Mallinson thrust Gray with his whole force, notwithstanding Gray resisted, out of the counting-house, and threw him down the stairs.

The articles then proceeded: "That, on this exhibitant getting up, the said John Mallinson followed him down the remainder of the said stairs, to the doorway leading into the street, and swore that he would kick this exhibitant's soul to hell, if he, this exhibitant, ever came near the place again, or used words to the like effect. And this exhibitant, on his oath, says, that by reason of the premises aforesaid, he, this exhibitant, verily believes that if he were to go on to the said premises of the said partnership, he, this exhibitant, will sustain great violence and personal injury from the said John Mallinson; and that, from the great strength and violent temper of the said John Mallinson, his life might be endangered; and that, by reason thereof, he has been prevented, ever since, by bodily fear, from visiting the said premises, or attending to the business of the said copartnership." The articles then stated that Gray had previously applied to the justices at Huddersfield, to bind Mallinson over to keep the peace towards him, and that the magistrates proceeded to hear evidence, notwithstanding Gray's objecting to it, with regard to the assault and the attendant circumstances, and ultimately dismissed the application. Gray then added, that, having given up his other business to enter into this partnership, he had no means of living apart from his income to be derived from the copartnership, and that, in order to carry on the same, it was important for him to be enabled to visit the premises without fear of violence or injury; and he concluded by swearing that he did not make the complaint from any malice or ill will to Mallinson, but merely for the preservation of himself from bodily harm, violence, and insult.

Cleasby, in support of the application. Though this is not a case in which the exhibitant states that he is in bodily fear, every where, and under all circumstances, yet, as he swears that he is unable to go upon the premises without fear of violence that may endanger his life, it is submitted that he is entitled to exhibit articles of the peace. It is true he might stay away from the warehouse and counting-house; but they belong to him as much as to the other partner. He is under the necessity of going there, in discharge of his ordinary business, and ought to be protected while so engaged.

[PATTESON, J. He does not swear in the usual manner that he continues to believe himself to be in danger.]

He cannot swear that in an unqualified form, but he swears that he believes that he will be in danger if he goes to the place, where he must go, to earn his livelihood. The justices acted wrongly in receiving evidence respecting the assault.

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PATTESON, J. I am not aware of any case precisely similar to this; but I think it falls within the principle on which articles of the peace are allowed to be exhibited. — *Rule granted.*

REGINA v. THE RECORDER OF LIVERPOOL.¹

Queen's Bench Bail Court, November 20, 1850.

Mandamus to hear Appeal — Declining of Jurisdiction — Refusing to hear Evidence — Construction of Local Sanitary Act — Poor-rate conclusive as to Value of Property.

A party rated under the Sanitary Act of Liverpool, in respect of his property within the borough, appealed to the Court of Quarter Sessions of the borough, on the ground that he was rated at too large a sum. The act which authorized the rate gave the appeal, and empowered the Court of Quarter Sessions, on appeal, to amend and quash the rate, provided, in sect. 156, that the net annual value of the property, in respect of which the person was liable to be rated, was to be ascertained according to the meaning of the words "net annual value" in the 6 & 7 Will. 4, c. 96, the act to regulate parochial assessments; and that it should, in all cases, for the purposes of the Sanitary Act, "be taken and estimated according to such value as the same was or should be rated or assessed in the rate or assessment for the relief of the poor in the year preceding." The assessment, in the rate appealed against, was made according to the poor-rate of the preceding year. On the appeal, the appellant proposed to show that the assessment, although according to the poor-rate, was too high; but the Recorder decided that, under sect. 156, he could not go into evidence as to the value, and dismissed the appeal.

The Court refused to grant a *mandamus* to compel the Recorder to hear the appeal, on the ground that the dismissal was not a declining of jurisdiction by him, but a decision on the appeal, and that, therefore, the Court had no power to issue the *mandamus*, whether the construction which the Recorder had put upon the act were right or wrong.

The Court held, also, that the decision of the Recorder was right, and that, under sect. 156, the poor-rate of the preceding year was, on an appeal against the rate under the local act, conclusive as to the value of the property assessed.

A RULE *nisi* had been obtained for a *mandamus*, commanding the Recorder of Liverpool to enter continuances and hear an appeal against a rate, called a paving-rate, made, on the 16th of May, 1849, by the town council of Liverpool, under the Liverpool Sanitary Act, the 9 & 10 Vict. c. 127.²

By that rate, the London and North-western Railway Company were rated and assessed in respect of their stations and tunnels in

¹ 20 Law J. Rep. (n. s.) M. C. 35.

² The statute 9 & 10 Vict. c. 127, "The Liverpool Sanitary Act" in sect. 151, gives the town council of Liverpool the power of making certain rates, including a rate called a paving-rate.

Sect. 152 enacts that every such rate shall be made and levied upon all persons holding, using, or occupying houses, &c., land, and tenements within the limits of the borough, "according to the full net annual value thereof respectively; the same to be ascertained in the manner hereinafter mentioned."

Sect. 156 is as follows: "And be it enacted, That the net annual value of all such property in respect of which the person who shall hold, use, or occupy the same is liable to be rated under the provisions in this act contained shall be ascertained according to the meaning of the words 'net annual value' as described in an act of

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Liverpool at the same value as they had been rated in respect of the same in a poor-rate made on the 29th of July, 1848, which the company had paid, and against which they had not appealed. No other poor-rate was made in the year 1848. A subsequent poor-rate had been made on the same assessment on the 3d of May, 1849. The company had appealed to the Special Sessions against that rate, on the ground that the assessment was too high, and the appeal had been respited, and was pending at the time when the application for the *mandamus* was made.

The company appealed against the rate, under the Sanitary Act, on the ground that they were rated at too large a sum.

It was arranged and agreed between the respective attorneys for the corporation and the company, that the question to be raised and decided by the Court of Quarter Sessions for the borough of Liverpool, should be, whether, under the Sanitary Act, the assessment of the preceding poor-rate of the 29th of July, 1848, was conclusive as to the value of the property, and that if the Court of Quarter Sessions should hold that it had jurisdiction to hear evidence as to value other than as to the amount of the assessment in the poor-rate of the 29th of July, 1848, the appeal should stand respited until the final decision of the appeal against the poor-rate of the 3d of May, 1849; but if not, that the appeal should be dismissed. In one of his letters, the attorney for the company intimated an intention to apply for a *mandamus*, if the Recorder should hold that the poor-rate was conclusive.

When the appeal came on to be heard, the Recorder decided that he had no jurisdiction in this case to go into evidence as to the correctness of the assessment; as, according to his construction of the statute, the Sanitary Act made the evidence of the poor-rate assessment conclusive as to value. The entry of the judgment of the Court of Quarter Sessions was as follows: "The rate confirmed, on the ground of no power to alter the rate for the poor. Appeal dismissed, but no costs; but the Court declined to grant a case."

Parliament passed in the session of Parliament held in the 6th & 7th years of the reign of his late Majesty, King William IV., and intituled 'An Act to regulate Parochial Assessments,' and shall in all cases for the purposes of this act be taken and estimated according to such value as the same is or shall be rated or assessed in the rate or assessment for the relief of the poor in the year preceding."

By sect. 158, if any property shall be omitted from the poor-rate, or shall be erected, completed, or occupied after the rate shall have been made for the relief of the poor in any year, it shall be lawful for the council to cause a valuation to be made of the annual rent or value thereof, and to cause the same rates or assessments for any of the purposes of this act to be made upon the owners or occupiers thereof, as the case may be, as they could have done if such property had been rated or assessed to the rate for the relief of the poor, &c.

By sect. 163, rates may be made prospectively or retrospectively.

By sect. 170, parties aggrieved by any rate are at liberty to appeal to the Quarter Sessions of the borough against the rates.

Sect. 171 enacts "That the Court of Quarter Sessions shall in any appeal against any rate, made under the authority of this act, have the same powers of amending or quashing such rates as are by law vested in such Court for amending or quashing the rates for the relief of the poor within their jurisdiction upon appeal against such rates," &c.

Crompton and *Pigott* showed cause, (Nov. 11.) There are two questions in this case: first, whether the Recorder was right in holding that he was precluded by the poor-rate assessment from going into any evidence of the value of the property rated to the paving-rate. Second, whether a *mandamus* can issue to review his decision, even if it be wrong in point of law. On the first point, it is submitted that the decision of the Recorder was right, and that he was precluded by the language of sect. 156 from admitting any evidence of the value of the property beyond the poor-rate. The enactment is clear, that the net annual value shall, for all the purposes of the act, be taken and estimated according to such value as the same is or shall be rated in the assessment for the relief of the poor for the year preceding. No argument contrary to the plain words of the provision can be founded on sect. 171, which gives the Quarter Sessions power, on appeal, to amend or quash the rates, for that section will have a full construction if it be held to apply to property not included in any poor-rate, or to the case where the rates under the local act have not followed the poor-rate. As to the second question, it is submitted that this Court cannot review the decision of the Recorder. It is a fallacy to say that he has declined jurisdiction. On the contrary, he has heard and decided the appeal. He had to decide on the construction of the act of Parliament, not for the purpose of ascertaining whether he would hear the appeal, but whether, when the appeal was being heard, he would admit certain evidence as to the value of the property. He held the evidence of the poor-law assessment conclusive. He has decided the case; he has dismissed the appeal, and refused to grant a case. Under these circumstances, it is apprehended, the *mandamus* cannot be granted. *The Queen v. Goodrich*, 19 Law J. Rep. (N. S.) Q. B. 413, which overrules *The King v. The Justices of Cumberland*, 4 Ad. & E. 695; *The Queen v. Blanshard*, 18 Law J. Rep. (N. S.) M. C. 110; and *The King v. The Justices of the West Riding of Yorkshire*, 5 B. & Ad. 1003; s. c. 3 Law J. Rep. (N. S.) M. C. 54, are in point.

Pashley, in support of the rule. First, the Recorder was wrong. The evidence of the poor-rate was not conclusive. The legislature gives an appeal against the rates under the local act; yet, if the poor-law assessment be conclusive, there is practically no appeal on the ground of too high an assessment. By sect. 171, the Quarter Sessions have the same power of amending or quashing rates, as in cases of appeal against a poor-rate. The Court, therefore, ought to have gone into evidence of the true value of the property. It was merely intended that the poor-rate assessment should be the *prima facie* basis of the rates under the Sanitary Act, so that the *onus* of proving it to be an incorrect basis should be thrown on the party appealing. Great hardships would ensue from holding a party precluded from showing the true value of his property. Vast changes in the value of property may have taken place between the date of the paving-rate and the time when the poor-rate was made. A warehouse may be built on what was formerly a field, or a building of

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great annual value may be burnt down in the interval. Such a change of value affords a good ground of appeal, and ought; it is submitted, to have been entertained by the Recorder. The first part of sect. 156, that the net annual value is to be ascertained as under the Parochial Assessment Act, is useless if the construction be right that the assessment for the poor-rate is conclusive. As to the second point, the Recorder has not heard the appeal. The entry of the Quarter Sessions that the appeal has been dismissed will not affect the granting of the *mandamus* to compel the hearing of the appeal. The Recorder declined to hear the case; he declined to receive any evidence. He has considered himself prevented by the act of Parliament from going into the merits of the case. The cases cited do not bear out the proposition that in a case like this a *mandamus* ought not to issue. In *The Queen v. Blanshard*, the return to the *mandamus* was, that the Justices had heard the appeal. The correspondence between the parties shows that a *mandamus* was to be applied for if the Recorder refused to entertain the appeal. — *Cur. adv. vult.*

PATTESON, J., now gave judgment. This being an appeal against a rate made by the town council of Liverpool under statute 9 & 10 Vict. c. 127, the ground stated by the London and North-western Railway Company (the appellants) was, that they were rated at too large a sum. The sum was the same at which they had been rated to the poor-rate in the year preceding, which sum they had paid without appeal; and the learned Recorder, considering himself bound by the 156th section of the act, refused to enter into any discussion as to that sum being a proper one, and dismissed the appeal. A rule *nisi* for a *mandamus* directing him to hear the appeal was obtained upon the ground that the dismissal was under the circumstances a declining of jurisdiction, which, by the true construction of the act, he had and ought to have exercised.

I am of opinion that the dismissal was not a declining of jurisdiction, but a decision upon the hearing of the appeal, and that this Court has no power to issue the writ of *mandamus*, whether the construction put upon the act by the learned Recorder be right or wrong. The last case upon this subject, viz., *The Queen v. Goodrich*, draws the true distinction, that when any preliminary step is necessary in order to give the Court of Quarter Sessions power to hear the appeal, and the Court comes to a wrong conclusion of *law*, not of *fact*, in respect to that preliminary step, this Court will interfere by *mandamus*. Here, however, there is no question as to any preliminary step, but the appeal is duly entered, called on, and argued and decided. Now, whether that decision proceeds upon a question of law or of fact, is wholly immaterial; it is equally a decision upon the appeal. In the present case, that decision in effect is, that by the true construction of the act, the poor-rate of the preceding year is conclusive upon the Court and the parties as to the valuation of the appellant's premises in the rate appealed against, and therefore the learned Recorder declined to go into evidence as to the propriety of that valuation. This is a declining to hear further evidence, because

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the evidence already adduced, namely, the poor-rate, concludes the parties. I am at a loss to see how this can possibly be treated as a declining of jurisdiction to hear the appeal. By arrangement between the attorneys on each side, it was agreed that the construction of the act should be the only point to be discussed before the Recorder, and that if he decided to hear further evidence, the case should be adjourned; but if not, the appeal should be dismissed. The first letter of the appellant's attorney mentions an intention to apply to this Court for a *mandamus*, if the learned Recorder should decide as he has done; but there is no acquiescence by the attorney of the respondents that such application might be made; nor, if there had been, would it have given this Court any power to direct a *mandamus* to issue. On this ground alone, I think that the present rule must be discharged.

But I think it right to add, that in my opinion the learned Recorder has come to a right decision. The section in question, the 156th, expressly provides that the valuation of the property "shall in all cases for the purposes of this act be taken and estimated according to such value as the same is or shall be rated or assessed in the rate or assessment for the relief of the poor in the year preceding." There are the words in the earlier part of the section, that the value shall be ascertained according to the meaning of the Parochial Assessment Act, and it is contended that the two parts of the section are to be taken separately, and that the latter part relates only to the Town Council, and the assessment to be made by them in the first instance; whereas the earlier part is general, and coupled with sects. 170 and 171, by which the appeal is given, and the Recorder invested with the same powers as to amending or quashing the rate as are by law vested in Courts of Quarter Sessions as to poor-rates, leaves the question of value at large with the Recorder on appeal. I do not think that such was the intention of the legislature, but that the whole of the 156th section must be read together, and must be applied to the question of value whenever and before whomsoever it might arise. There are many other matters to which the 171st section will apply, as, for instance, to the fact whether the rate appealed against does assess the appellant in the same sum as the poor-rate, and other cases which might easily be suggested. It is also to be observed, that by sect. 158, where property is omitted in the poor-rate, or has been increased in value since the poor-rate, a new valuation is directed to be made; and, on appeal in such a case, the 171st section would operate. But there is no provision for the case of property included in the poor-rate being diminished in value. Such a diminution might be suggested in all cases; and if the Recorder were to inquire by evidence into the present value, on the supposition of such diminution, he would in effect render the 156th section wholly nugatory. If, on the other hand, he were to inquire by evidence into the value at the time the poor-rate was made, he would in effect be trying an appeal against the poor-rate which has been acquiesced in and paid. It is only for one year that the appellants are concluded; for if there has been a diminution in value, and the assessment in

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the poor-rate of the same year as the rate now appealed against be too high, an appeal will lie against such poor-rate, and the question will then be properly raised; and the other rate to be made under the act in question in the following year will be conformable to the decision of such appeal. Thus the valuation under the act will in all cases, except those contemplated in sect. 158, follow the poor-rate conclusively, which, in my opinion, is the clear intention of the legislature. — *Rule discharged.*

**ESTHER ABERDEIN, Executrix, v. WILLIAM JERDAN, THOMAS IRWIN,
and WILLIAM FRANCIS AINSWORTH.¹**

November 5, 1850.

The grantor of an annuity, immediately after the execution of the annuity deed, gave back to G., the agent of the grantee, who also acted as his agent in the transaction, a part of the consideration for the purchase of the annuity, in payment of a debt due from himself to G., and also for the expenses in relation to the transaction:—

Held, that there was no return of the consideration money within sect. 6 of stat. 53 Geo. 3, c. 141.

PHIPSON moved, on behalf of the defendants Irwin and Ainsworth, for a rule calling upon the plaintiff to show cause why an annuity deed, dated the 22d April, 1842, by which William Jerdan granted an annuity of 130*l.* to the testator, Adam Aberdein, and the warrant of attorney of the same date, executed by William Jerdan, and the other two defendants as sureties, should not be delivered up to the defendants to be cancelled, and why the judgments which had been signed on the warrant of attorney should not be set aside, on the ground that part of the purchase money of the annuity was returned, or part of the consideration for it was retained. It appeared, from the affidavit of William Jerdan, that, by indenture, bearing date the 22d April, 1842, between William Jerdan of the first part, Thomas Irwin and William Francis Ainsworth as sureties for William Jerdan of the second part, and Adam Aberdein, since deceased, of the third part, William Jerdan, in consideration of the sum of 700*l.* received by him, granted to Adam Aberdein an annuity of 130*l.* for the term of ninety-nine years, if William Jerdan should so long live; and that, for securing the due payment of the annuity, the defendants executed a warrant of attorney, bearing the same date, to enter up judgment against them, or either of them, for the sum of 1400*l.* and costs of suit; and that a memorial of the annuity was duly enrolled in the High Court of Chancery, and judgment was signed upon the warrant of attorney against the defendants. Adam Aberdein had died, having made his will, by which he appointed the plaintiff his executrix, and the judgment had been revived by *sci. fa.* In 1849, William Jerdan

became bankrupt, having paid in the whole for the annuity upwards of 1200*l*. The plaintiff proved under the fiat against William Jerdan for the value of the annuity at the date of the fiat, viz., 556*l*. 1*s*. 6*d*.

The affidavit further stated, that before and at the time of the grant of the annuity, James Gibbs acted as the attorney both of William Jerdan and of Adam Aberdein, in and about the grant of the annuity, and prepared in his office the annuity deed and warrant of attorney: that at that time he was indebted to James Gibbs in the sum of 400*l*. upon acceptances of bills of exchange: that James Gibbs first proposed that he should borrow 700*l*., by way of annuity, of Adam Aberdein: that Adam Aberdein was a client of James Gibbs: that James Gibbs acted as solicitor to both parties in the transaction of the annuity, which was completed at the office of James Gibbs, he being present at that completion: that just before the deed of annuity and warrant of attorney were executed, James Gibbs called him alone into another room at his house, and stated that the delivery of the money must be formally done to make the thing valid, and that upon returning into the office of James Gibbs, where the said Adam Aberdein was, the deed of annuity and warrant of attorney were formally executed by him, and attested by the witnesses in the memorial, and the 700*l*. was then formally handed over to him, in Bank of England notes, by James Gibbs; but that immediately afterwards, and before he left James Gibbs's house, he, at the request of James Gibbs, gave back to him the sum of 400*l*. out of the sum of 700*l*. in payment of the acceptances held by James Gibbs, and also in payment of the costs and expenses in relation to the annuity transaction.

By sect. 6 of stat. 53 Geo. 3, c. 141, if any part of the consideration for the purchase of any annuity shall be returned to the person advancing the same, or if the consideration, or any part of it, shall be retained on pretence of answering the future payments of the annuity, or any other pretence, the Court may order the annuity deed to be cancelled, and the judgment in the action to be vacated. The grantee of the annuity is bound by the act of his agent in negotiating the annuity. *Williamson v. Gould*, 1 Bing. 234. [WIGHTMAN, J. In that case the grantor of the annuity never had the money in his hands; the money was shown to him, but the whole of it was never paid over. ERLE, J. Here a private debt due to the agent was paid. WIGHTMAN, J. Suppose the 400*l*. had been paid back to Gibbs two hours after.] Here the return of the 400*l*. was part of the same transaction. In *Gorton v. Champneys*, 1 Bing. 287, the Court set aside the annuity deed, where the person employed by the grantor to raise money, and by the grantee to pay the consideration money to the grantor, at the time of payment received back part of it for a debt alleged to be due from the grantor to himself. [ERLE, J. The judgment in that case is confined to the overbearing conduct of the firm of Howard & Gibbs, and is almost a judgment *in personam*; it goes into a history of all the extortion exercised by them, and treats the transaction as a complicated mystery, and as probably a fraud of that firm in taking back the money. WIGHTMAN, J. In this case there is

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no suggestion of a want of *bona fides*, or that the sum retained was exorbitant, and the whole of the money was handed over to the grantor of the annuity.] It appears to have been a preconcerted matter, and that the handing over the whole of the purchase money was collusive. [He cited *Carlton v. Porter*, 2 Bing. 370, and *Henry v. Taylor*, 3 Bing. 147.] [ERLE, J. There is no case, except those in which Howard & Gibbs were concerned, in which the annuity has been set aside upon this objection; and in those cases it was done upon the ground, that the transaction was a pretence and practice of that firm.] In *Williamson v. Gould*, 1 Bing. 234, the Court treated Williamson and Gould as independent parties, and Gibbs as the agent of both. Further, this is an application on behalf of sureties who are favored by the law.

LORD CAMPBELL, C. J. There is no rule of law, that all the annuities which were negotiated by Howard & Gibbs are to be set aside. We must look to see whether the provisions of the Annuity Act, 53 Geo. 3, c. 141, have been violated. Now, here there has been no violation of the conditions in sect. 6; the grantor of the annuity received the whole of the purchase money, and there was neither a return or a retaining of any part of it within the meaning of that section. There was no return of part, if a just debt due to Gibbs was paid out of the consideration money; and here, as far as we can see, it was a voluntary payment by the grantor of the annuity.

COLERIDGE, WIGHTMAN, and ERLE, JJ., concurred. — *Rule refused.*

BARTON v. BRICKNELL.¹

November 27, 1850.

Justice of the Peace — 11 & 12 Vict. c. 44, ss. 1, 2 — Excess of Jurisdiction — Trespass, when maintainable.

By the 11 & 12 Vict. c. 44, s. 1, it is enacted that every action against a justice, for any act done by him in the execution of his duty as such justice, with respect to any matter within his jurisdiction as such justice, shall be an action on the case, and in the declaration it shall be expressly alleged that such act was done maliciously and without reasonable and probable cause. Sect. 2 provides that for any act done by a justice in a matter of which by law he has not jurisdiction, or in which he shall have exceeded his jurisdiction, any person injured thereby, or by any act done under any conviction, &c., issued by such justice in any such matter, may maintain an action against such justice, in the same form and in the same case, as he might have done before the passing of the act:—

Held, that the two sections must be read together, and that sect. 2 applies only to those cases where the act, in respect of which the action is brought against the justice, is itself an excess of jurisdiction.

Therefore, where a justice convicted the plaintiff in a penalty, and adjudged that it should be levied by distress and sale, but exceeded his jurisdiction in ordering the plaintiff, in default of payment, to be set in the stocks, which, however, was never done, but the penalty was levied by distress:—

¹ 20 Law J. Rep. (N. S.) M. C. 1.

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Held, that an action of trespass for seizing the goods under the distress was not within sect. 2, and was not maintainable by reason of sect. 1.

TRESPASS for breaking and entering the plaintiff's dwelling-house, and seizing his goods, and retaining possession of them until the plaintiff was compelled to pay 1*l.* 14*s.* to regain possession, alleging as special damage that the plaintiff was obliged to lay out and expend a large sum of money, to wit, &c., in quashing a conviction, the quashing whereof was necessary to enable the plaintiff to maintain this suit.

Plea — not guilty “by statute.”

At the trial, before PLATT, B., at the Oxfordshire Spring Assizes, 1850, it appeared that the defendant, a magistrate of that county, had convicted the plaintiff under the 29 Car. 2, c. 7, for unlawful trading upon a Sunday. The conviction adjudged that the plaintiff should pay a penalty of 5*s.*, together with 1*l.* 1*s.*, the costs of the prosecutor, and that if the said several sums were not paid forthwith, the same should be levied by distress and sale of the goods of the plaintiff, and in default of sufficient distress, it adjudged the plaintiff to be set in the stocks for two hours, unless the said several sums and *all costs and charges of the said distress* should be sooner paid. This conviction was afterwards brought up by *certiorari*, and quashed by this Court, on the ground that the award of the punishment of the stocks was unauthorized as to the costs, though it was warranted as to the penalty. See *The Queen v. Barton*, 18 Law J. Rep. (N. S.) M. C. 56. The defendant had issued a warrant of distress founded upon this conviction, under which the plaintiff's goods were seized, to regain which he had paid 1*l.* 14*s.*, being the amount of the penalty and the costs of the conviction and of the distress, and the action was brought in respect of this seizure. The plaintiff never was, in fact, put in the stocks at all.

At the trial it was objected that, under the 11 & 12 Vict. c. 44, s. 1, the action was misconceived, and should have been on the case, and that the declaration should have alleged that the defendant acted maliciously and without reasonable or probable cause. The learned Judge, however, declined to stop the case on this point. The jury found upon evidence to that effect, given by the defendant, that the plaintiff was actually guilty of the offence of which he had been convicted, and that he was liable by law to pay the sum levied under the distress, and the jury returned a verdict for the plaintiff, giving 1*s.* damages for taking the distress, and 22*l.* 7*s.* 10*d.* as the costs of quashing the conviction. Leave was reserved to the defendant to move to enter a verdict in case the Court should be of opinion that the form of action was misconceived, or to reduce the damages either to 1*s.* in case the costs of quashing the conviction could not be recovered as special damage, or to 2*d.* under the 11 & 12 Vict. c. 44, s. 13. A rule *nisi* having been accordingly obtained, —

Whateley and Gray now showed cause. The defendant in this

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case exceeded his jurisdiction by ordering the plaintiff to be put in the stocks, and therefore the action might properly be brought in trespass according to 11 & 12 Vict. c. 44, s. 2. It is for an act done in a matter in which he has exceeded his jurisdiction. Sect. 1 applies only where a Justice has acted entirely within his jurisdiction, but the conviction has been set aside for some defect of form; and there it is necessary to allege and prove malice.

[WIGHTMAN, J. This action was not for any act done beyond the defendant's jurisdiction.]

That is immaterial: the conviction upon which the distress was founded was bad, because it was partially without jurisdiction, and there is nothing in the words of sect. 2 to limit it to actions brought for that part which is excessive. In *Leary v. Patrick*, 19 Law J. Rep. (N. S.) M. C. 211, this Court held that trespass would lie where a Justice has acted beyond his jurisdiction.¹

[WIGHTMAN, J. There the act complained of was an excess of jurisdiction.]

Keating and *Greaves*, in support of the rule. This case involves a very important point to magistrates who act substantially within their jurisdiction. The object of the 11 & 12 Vict. c. 44, is to protect Justices from vexatious actions for acts done by them in the execution of their office: and this is clearly a case to which, if possible, the protection should be extended. Sect. 1 applies wherever the Justice acts in a matter in which the information laid before him gives him jurisdiction.

[COLERIDGE, J. What is meant then by exceeding his jurisdiction, in sect. 2?]

It will apply where the matters stated in the information are partially beyond his jurisdiction. Now, here the defendant clearly had jurisdiction over the matter brought before him, but he erroneously sentenced the plaintiff to the stocks in default of non-payment of the costs. The act done for which this action is brought is, not putting the plaintiff in the stocks, but the levying the penalty and costs by distress. That was a matter which he clearly had jurisdiction to order, and that jurisdiction cannot be affected by the addition of an improper alternative, which, in the result, has become quite inoperative. *Leary v. Patrick* is quite consistent with the view taken, that, to come within sect. 2, the act for which the action is brought must be itself an excess of jurisdiction.

[COLERIDGE, J. This is literally within sect. 2: it is an act done in a matter in which the defendant has exceeded his jurisdiction.]

[ERLE, J. Suppose it falls within the words of both sections.]

¹ They also argued that sect. 13 of the act confined the damages to 2*l*. in respect only of imprisonment, and did not apply to a case like the present, where the action was brought for seizing goods; and also that the costs of quashing the conviction could be recovered as special damage. For the defendant, the 41 Geo. 3, c. 141, was referred to on the first, and *Holloway v. Turner*, 6 Q. B. Rep. 928; s. c. 14 Law J. Rep. (N. S.) Q. B. 143 on the second of these points. As no opinion was expressed by the Court, it is thought needless to notice them more fully.

Then the Court will look to the spirit and intention of the act, and construe the clauses so as not to make them contradictory.

COLERIDGE, J.¹ I quite agree that this is a very important case, and that the statute 11 & 12 Vict. c. 44, is not very clearly worded. For both these reasons, it is prudent for us to decide no more than is absolutely necessary to dispose of this rule. Therefore I confine what I have to say to the construction to be given to the first and second sections of the act. I think this case falls directly within sect. 1. The defendant had an information laid before him, which on the face of it was in a matter clearly within his jurisdiction; he heard the case, and awarded a penalty and costs, with a power of levying them by distress. So far he acted quite rightly; but he went and added an alternative that the party convicted should be put in the stocks for the costs. In this point it is conceded on all hands that he exceeded his jurisdiction. Then, instead of actually putting the plaintiff in the stocks, the amount of the penalty and costs is levied by distress. Afterwards the conviction is quashed here because of the excess of jurisdiction. It cannot be doubted that up to the award of the stocks, all the proceedings were right, and this action is brought, not for putting the plaintiff in the stocks, but for seizing his goods under a warrant of distress for the penalty and costs. Sect. 1 says, that any action brought against a Justice for any act done by him in the execution of his duty as such Justice, with respect to any matter within his jurisdiction as such Justice, shall be an action on the case, and contain an allegation of malice and want of reasonable and probable cause. It is impossible to find words more exactly representing the present cause of action than those, and according to their literal meaning, if they stood alone, without sect. 2, the plaintiff having brought an action of trespass, must have been nonsuited. We must then see whether it is within the spirit of the act to give this full effect to the words of sect. 1. The act is passed to protect Justices in the execution of their duty; and that section must contemplate some informality in the proceedings, otherwise no protection would be required. Sect. 2, which is relied on by the plaintiff, speaks of acts done by a Justice in a matter of which he has not jurisdiction, or in which he shall have exceeded his jurisdiction. Now, I am not prepared to deny that this case may range itself within the literal meaning of these words; for this action is certainly brought for an act done by a Justice in a matter in the course of dealing with which he has exceeded his jurisdiction; but the following words are, that "any person injured thereby, or by any act done under any conviction or warrant issued in such matter," may maintain an action in the same form and case as he might have done before the act passed. If we gave these words their literal meaning, it would be impossible to reconcile them with sect. 1; and the general rule in construing a statute is, if possible, to reconcile

¹ LORD CAMPBELL, C. J., was sitting at *Misi Prime*, and PATTERSON, J., had gone, to attend at chambers.

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all its parts, and give full effect and meaning to the whole. That may be done here by supposing sect. 2 to apply to cases where the party brings his action for the thing which is itself the excess of jurisdiction. If this action had been for putting the plaintiff into the stocks, it is extremely probable that trespass would have lain. But as that was not done, we may, I think, leave sect. 2 out of the question, and hold that the defendant is protected by sect. 1. It is, therefore, unnecessary to decide the point arising on sect. 13, or as to the special damage.

WIGHTMAN, J. It appears to me that the objection taken to the form of this action is well founded, and that the defendant is entitled to the protection of sect. 1, of 11 & 12 Vict. c. 44, as this action was brought for an act done by him in the execution of his duty as a Justice with respect to a matter within his jurisdiction as such Justice. It is an action of trespass to recover damages for having levied the plaintiff's goods under a warrant of distress, issued in a matter over which he certainly had general jurisdiction, and in which an information having been regularly laid before him, he had jurisdiction to proceed so far as to award payment of the penalty and costs, and that these might be levied by distress and sale. But he went further, and ordered that, in default of payment, the plaintiff should be set in the stocks. He never was, in fact, set in the stocks; but under a warrant of distress which the defendant had jurisdiction to issue, his goods were seized and the penalty and costs levied. For this taking the present action is brought. It seems to me that this falls within sect. 1. It is argued that the case falls within sect. 2, because it happens that, although the action is not brought for any particular act in which the Justice has exceeded his jurisdiction, he has in one part of the proceedings gone beyond his jurisdiction, and that, therefore, trespass may well be brought. Now, in order to reconcile sects. 1 and 2, we must, I think, hold that this is not an act done by a Justice in a matter in which he has exceeded his jurisdiction, although in case the plaintiff had been put in the stocks and the action had been brought in its present form for that, it would have been brought for an act done in a matter in which he had exceeded his jurisdiction. The matter of which he had no jurisdiction was the ordering the plaintiff to be set in the stocks. The present action is brought not for that, but for an act done in a matter over which he certainly had general jurisdiction, and it is, therefore, within sect. 1.

ERLE, J. I also concur in the opinion which has been given. This case is one of considerable importance in respect of the construction of a statute of very wide application. I think the cause of action was an act done by a Justice in the execution of his duty in respect of a matter within his jurisdiction. The defendant was a competent tribunal to try and convict the plaintiff, and he had jurisdiction to order payment of the penalty and costs, and to direct them to be levied by distress and sale of the plaintiff's goods. That is

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what he has, in fact, done, and so he has not by any of the acts complained of exceeded his jurisdiction. But the plaintiff has been enabled to maintain an action against the defendant, because there was a defect of form in the judgment pronounced by him by reason of his ordering the plaintiff to be put in the stocks in case of non-payment of the costs. If any thing had been done upon that wrongful order as to the stocks, I think it would have been a matter not within the jurisdiction of the defendant as a Justice. The present is one of those cases where a few words perfectly immaterial to the plaintiff have crept into the conviction, by reason of which he has been enabled to get it quashed, and to bring an action in respect of all that has been done under it. I think it is precisely the case intended to be provided for by sect. 1, and where malice and want of probable cause is essential to give a right of action. The only difficulty which arises is under the words of sect. 2. But it seems to me necessary to hold that a limitation must be put on that section. We must construe both clauses together, and prevent them from conflicting. In any case where the cause of action arises out of, or is proximately connected with, an excess of jurisdiction, an action of trespass would be proper. The present case affords an example of this. If the action had been for putting the plaintiff in the stocks, trespass might have been brought for that cause of action. — *Rule absolute.*

No action lies against a justice of the peace for an act done judicially, and within the scope of his jurisdiction, unless he acts corruptly or from impure motives. *Gregory v. Brown*, 4 Bibb, 28. He is not responsible for an error in judgment merely. *Walker v. Floyd*, 4 Bibb, 237. *Adkins v. Brewer*, 3 Cowen, 206. *Ely v. Thompson*, 3 A. K. Marshall, 70. *Lining v. Bentham*, 2 Bay. 1. But he is liable if he acts beyond his jurisdiction, although there be no proof of malice, or of a design to oppress. *Adkins v. Brewer*, supra. *Case v. Shepherd*, 2 Johns. Cases, (2d ed.) 27 & note. *Blood v. Sayre*, 17 Vermont, 607. And this rule has been applied where a justice issued an execution in a less time after judgment was rendered than was allowed by law, (*Briggs v. Wardwell*, 10 Mass. 351;) and where he

rendered judgment and issued execution after his jurisdiction had ceased, (*Spencer v. Perry*, 17 Maine, 413;) and to a case where a justice, contrary to an express statute, rendered judgment in a cause in which he was interested. *Russell v. Perry*, 14 New Hampshire, 152. So where he issued a warrant against a person, as the father of a bastard child, no complaint having been made to authorize it. *Poult v. Slocum*, 3 Blackford, 421. But if a magistrate issue a warrant upon an information brought before him, charging an offence within his cognizance, he is not liable for a false imprisonment, although the information disclose no legal evidence against the alleged offenders, and although it purport to be founded upon inadmissible hearsay evidence. *Cave v. Mountain*, 1 Mann. & Grang. 257.

Regina v. The Inhabitants of Carew.

REGINA v. THE INHABITANTS OF CAREW.¹

November 13, 1850.

A notice of appeal given by the overseers, under sect. 8 of stat. 9 Geo. 1, c. 7, is good, if signed by their attorney.

UPON appeal against an order by two Justices of the county of Kent, for the removal of a pauper from the parish of Speldhurst, in the county of Kent, to the parish of Carew, in the county of Pembroke, the order was confirmed, subject to the opinion of this Court. At the hearing of the appeal, the appellants put in a notice of appeal, which, after the usual heading, proceeded: "I hereby give you notice that the church-wardens and overseers of the poor of the parish of Carew, in the county of Pembroke, do intend, at the next General Quarter Sessions, &c., to enter and prosecute an appeal against an order, &c., dated, &c. Robert Lanning, attorney for and on behalf of the church-wardens and overseers of the poor of the said parish of Carew." If the Court of Queen's Bench should be of opinion that the notice of appeal is not good, then the order of the Court of Quarter Sessions was to be confirmed. If the Court should be of a contrary opinion, the order of removal and the order of Quarter Sessions were to be quashed.

Horn, in support of the order of Sessions. Sect. 8 of stat. 9 Geo. 1, c. 7, requires the notice of appeal to be "given by the church-wardens or overseers of the poor." In *Rex v. Kimbolton*, 6 Ad. & El. 603, it was thought that the grounds of appeal under sect. 81 of stat. 4 & 5 Will. 4, c. 76, must be sent or delivered to the overseers themselves, and that service on their attorney was not sufficient.

Archbold and *Deedes*, contra, referred to *Rex v. The Justices of Monmouthshire*, 7 Law J. Rep. M. C. 95, cited in *Rex v. Kimbolton*, 6 Ad. & El. 607, note, in which Lord Tenterden held, that a notice of appeal signed by the attorney for the appellant parish was good; and *Reg. v. The Justices of Middlesex, in re The Parish of St. Marylebone*, in this term, (November 10, before Patteson, J.) Sect. 81 of stat. 4 & 5 Will. 4, c. 76, directs that the notice of grounds of appeal shall be under the hands of the overseers.

LORD CAMPBELL, C. J. I am glad to have my own opinion fortified by such high authority; but if there were no decision, I should hold, without doubt, that sect. 8 of stat. 9 Geo. 1, c. 7, which does not require that the notice shall be under the hands of the church-wardens or overseers, or signed by their own hands, is satisfied by a notice signed by their attorney.

COLERIDGE, WIGHTMAN, and ERLE, JJ., concurred. — *Order quashed.*

Medlicott v. Williams. — Adams v. Andrews.

MEDLICOTT v. WILLIAMS.¹

Queen's Bench Hall Court, November 21, 1850.

Rule to compute — Service on Defendant's Clerk at Defendant's Warehouse.

A rule nisi cannot be made absolute, no cause being shown, on an affidavit which states that service of the rule has been effected on a clerk of the defendant, at the warehouse of the defendant. The old practice of requiring a service at the defendant's dwelling-house must be adhered to.

THIS was a motion to make absolute a rule to compute on affidavit of service, no cause being shown.

The affidavit stated that the deponent left a true copy of the rule nisi "at the warehouse of the above-named defendant, with W. L., a clerk of the said defendant, and that at the same time he, this deponent, showed to the said W. L. the said original rule."

C. J. Dawson. This, it is submitted, is a sufficient service on the defendant. It is true that in *Warrick v. Bacon*, 8 Sc. N. R. 667; s. c. 14 Law J. Rep. (N. S.) C. P. 34, service on a clerk at the defendant's counting-house, and in *James v. Westdale*, 9 Dowl. P. C. 104, 5 Jur. 24, service on the shopman of the person in whose house the defendant resided, were held to be insufficient; but in *King v. Tomlinson*, 6 Jur. 999, service on a warehouseman of the defendant at the defendant's warehouse, was held to be a good service by the Court of Exchequer. — *Cur. adv. vult.*

PATTESON, J., now said, I have spoken to my brother Parke, with respect to the case of *King v. Tomlinson*. He informs me that there must be some mistake in the report of that case or in the Court, and that at any rate the decision is not law; and that the practice of the Court of Exchequer is to require that the service should be made at the dwelling-house of the defendant. The rule, however, may be enlarged to admit of a proper service. — *Rule enlarged*

ADAMS v. ANDREWS.²

November 7, 1850.

Practice — Motion for New Trial, after Bill of Exceptions tendered.

Where a bill of exceptions has been tendered, the party cannot afterwards move for a new trial upon a point which might have been (but was not) included in the bill of exceptions, without abandoning the bill of exceptions.

Semble, that if the point could not have been included in the bill of exceptions, the motion for a new trial might have been made concurrently.

¹ 20 Law J. Rep. (N. S.) Q. B. 33.

² 20 Law J. Rep. (N. S.) Q. B. 39.

Adams v. Andrews.

CASE for the disturbance of a pew. The declaration stated that at the time of the committing of the grievances, &c., the plaintiff was lawfully possessed of a certain messuage and premises, with the appurtenances, situate in the parish of East Moulsey in the county of Surrey, and had, and of right ought to have, for himself and his family, inhabiting in the said messuage, &c., the use and benefit of a certain pew, in the parish church of East Moulsey aforesaid, as to the said messuage belonging and appertaining, yet that the defendant, &c.

Pleas, (amongst others,) first, not guilty; second, that the plaintiff had not for himself and his family the use of the said pew, &c.

At the trial, before Erle, J., at the Surrey Summer Assizes, 1850, it appeared that the pew in question was built in the form of a wing to the church; that the entrance to it was from the churchyard, through a door; that the only communication between it and the church was an opening in the wall, the pew being on a higher level than the floor of the church; and that the only mode of getting into it from the church was by climbing. The pew had an external roof, which was covered with lead or tiles. It was objected that there was a variance, as the evidence showed that the pew was not part of the church, and so that the allegation that it was in the parish church was not supported. The learned Judge thought there was no such variance, and left the question of the plaintiff's title to the jury.

A bill of exceptions was tendered to the ruling of the learned Judge upon two points; one being that the jury might upon the evidence before them presume the existence of a faculty; and the other, that there was sufficient evidence of disturbance to warrant them in finding a verdict for the plaintiff.

Montagu Chambers now moved for a new trial, on the ground that the learned Judge was wrong in directing the jury that there was evidence of the pew being in the church.

[LORD CAMPBELL, C. J. You cannot move for a new trial without abandoning your bill of exceptions.]

It is stated that the practice is otherwise in 2 Arch. Pract. p. 1324, 8th edit., on the authority of *Crotty v. Price*, 5 Jur. 434. It is necessary to mention the fact of the bill of exceptions being pending, in order to save it in case of failure on the motion. It may frequently happen that the ground for a new trial may not be the subject of a bill of exceptions, as where the verdict has been obtained by false evidence. There, clearly, both remedies should be open.

[ERLE, J. The objection that the pew was not in the church, but an excrescence from it, and so did not support the declaration, was one which might have been included in the bill of exceptions.]

LORD CAMPBELL, C. J. The ground of your motion here is, that there was a misdirection in a matter of law which might have been included in the bill of exceptions. Possibly, if it could not have been excepted to, a motion on the point might be permitted. But I do

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not think you can make this motion without abandoning your exceptions.

COLERIDGE, J., WIGHTMAN, J., and ERLE, J., concurred. — *Rule refused.*

DOE d. CAMPTON AND WIFE v. CARPENTER.¹

December 6, 1850.

Devise — Construction — False Demonstration — General Words of Devise.

A testator devised to J. S. "all those my three messuages, with the gardens, close of land, and all other my real estate whatsoever, situate at Little Heath, in the parish of F., now in the occupation of myself, A. and B." At the date of the will, and at the death of the testator, he was possessed of three messuages, with gardens and a close of land, at Little Heath, which were in the occupation of himself, A. and B. He had also the reversion in a house and garden, situate at Little Heath, which was in the occupation of C., who was entitled to it for life. Besides these, he had no other property in the parish of F.: —

Held, that the house and garden, in the occupation of C., passed under the general devise to J. S.

Words of description, following a general devise, will not be construed as restrictive, where the effect of doing so would be to render the general devise inoperative, and where they may be rejected as a false demonstration.

EJECTMENT to recover a house, &c., and garden, at Little Heath, in the parish of Foleshill, in the county of Warwick.

At the trial, before Lord Campbell, C. J., at the Coventry Spring Assizes, 1850, it appeared that the premises in question in the cause had been devised by William Smith (who was seized of them in fee) to Ann Carpenter (the mother of the defendant) for life. Ann Carpenter entered upon and continued to occupy the premises in question until her death in 1844. Wells Smith, (the heir at law of William Smith,) by his will, made in October, 1842, devised as follows: "I give and devise unto my daughter Jane Campton (wife of the lessor of the plaintiff) all those my three messuages or tenements, with the gardens, close of land, and all other my real estate whatsoever, situate and being at Little Heath, in the parish of Foleshill aforesaid, now in the occupation of myself, [and fourteen other persons, not including Ann Carpenter,] "to hold the same unto my said daughter Jane Campton, her heirs and assigns forever." Wells Smith died in November, 1842. The premises occupied by Ann Carpenter, at the time of the death of Wells Smith, were situate at Little Heath, in the parish of Foleshill; the three messuages, &c., with the gardens and close of land specifically devised to Jane Campton, were at the time of the death of Wells Smith in the occupation of himself and the fourteen other persons named in the will, and, except the premises then in the occupation of Ann Carpenter, formed the whole of the property of which Wells Smith was seized. For the defendant, it was contended

¹ 20 Law J. Rep. (n. s.) Q. B. 70.

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that no property passed to Jane Campton, except such as was in the occupation of the testator or one of the fourteen persons named. The learned Judge thought that this was a false demonstration, which might be rejected, and the plaintiff had a verdict, with liberty to the defendant to move to enter a verdict in case the Court should think that the premises in question did not pass by the devise. A rule *nisi* having been accordingly obtained, —

Hayes and *Willes* now showed cause. The words of occupation here may be rejected so far as relates to the general words of devise, "all other my real estate whatsoever, situate at Little Heath in the parish of Foleshill, aforesaid," and if that is done, there will still remain a perfect description of the property now in question. That distinguishes the present case from *Doe d. Hubbard v. Hubbard*, 14 Jur. 1110, where, if the words of occupation had been rejected, there would have remained nothing at all to identify the property intended to pass. There, too, every word of the will was satisfied by the particular property. Here the contrary will be the case, unless the words of occupation are restricted to the three messuages or tenements particularly devised. By rejecting a mistake suggestive as to the reversion, effect can be given to the whole of the words. *Goodtitle v. Southern*, 1 M. & S. 299. *Nightingall v. Smith*, 1 Exch. Rep. 879. *Morrell v. Fisher*, 4 Exch. Rep. 591; s. c. 19 Law J. Rep. (N. S.) Exch. 273. The maxim *falsa demonstratio non nocet* applies equally to a general and to a particular devise. *Welby v. Welby*, 2 Ves. & B. 192. But the general words here, being limited to property at Little Heath, are rather in the nature of a particular devise.

Whitehurst and *Mellor*, in support of the rule. Wherever, as here, words apparently of description are superadded to a general devise, they will be construed restrictively, and cannot therefore be rejected; as if a man grant all his lands in the parish of Dale which are now in the tenure of J. S.: there no lands except such as are held by J. S. will pass. *Shep. Touchst.* 100. So in *Wilson v. Mount*, 3 Ves. Jun. 191, the words "which I have surrendered to the use of my will" were held to restrict a preceding general devise.

[*Willes* referred to *Oxenforth v. Cawkwell*, 2 Sim. & S. 558; s. c. 4 Law J. Rep. Chanc. 193, which had overruled that decision.]

Roe d. Conolly v. Vernon, 5 East, 51, lays down the rule as to construing words following a general gift as restrictive.

[*LORD CAMPBELL*, C. J. Here there is a complete description before these words, and if these are construed as words of restriction, that portion of the devise cannot operate at all; for it was proved that the specific devise of the three messuages, with the gardens and close of land, just corresponded with the occupations named.]

There was no evidence to show that the testator might not have had other property at Little Heath in the occupation of some of those persons.

LORD CAMPBELL, C. J. I come to the conclusion that the reversion

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in question passed under this devise to the wife of the lessor of the plaintiff. It is unnecessary to enter into the authorities which we so lately reviewed in *Doe d. Hubbard v. Hubbard*, where the majority of the Court thought that the maxim *falsa demonstratio non nocet* did not apply, because there was no perfect and true demonstration without the words sought to be rejected. Here, however, there are words containing a complete description of the property intended to pass previous to the words of occupation, viz. "all other my real estate whatsoever, situate at Little Heath in the parish of Foleshill." If it stopped there, it could not be doubted that this reversion would pass. Then come the words "now in the occupation of myself, &c.," which, as applied to the reversion, is a false demonstration, but it follows a true and complete demonstration of that property. It has been argued that wherever words can be construed as restrictive, they cannot be taken to be a false demonstration. But effect must be given to the whole words of the devise, and that is done in the cases cited. But here, if those words are construed to be restrictive, no effect whatever is given to the words "all my real estate whatsoever, situate at Little Heath," because, unless this reversion pass under those words, they can have no operation at all, for all the rest of his property in the parish would pass, independently of them. On that principle, therefore, we must hold that the words of occupation are confined to the specific subjects of devise.

PATTESON, J. In all the cases referred to, where the words have been construed to be restrictive, they had not the effect of rendering inoperative any part of the will. They gave a particular sense to the words, and made them operate in that sense. Now, suppose there had been only the general words in this will, "all my real estate, situate at Little Heath, in the parish of Foleshill, now in the occupation of myself and" the other persons named, (leaving out of the question the messuages, &c., in the occupation of the testator and the fourteen other persons,) there would then be no lands at all in the occupation of any of the specified persons; and could it be contended that nothing at all passed under the devise, and that the rule *falsa demonstratio non nocet* did not apply? But the case is not altered because there is a previous specific devise of property as to which this demonstration applies truly, and which exactly fulfils the whole of the demonstration. If the words "all other my estate" are read, as they must be, to mean something different from what was devised before, we must say that the words of occupation are as to it a false demonstration.

WIGHTMAN, J. It is agreed that, as a general proposition, effect must be given to every word of the will. Now, here is a devise by specific words, and then by general words, followed by a description of the locality and occupation, which is wholly true as to the specific devise, but only partially true as to the general devise. And the testator had other property besides that specifically devised. If the words of description were construed restrictively, they would be lim-

Hawker v. Field.

ited to the specified property, and that only would pass; the general words would be inoperative. If, on the other hand, the words of description be rejected in respect of the general devise, there would be enough to point out this particular land intended to pass. Therefore this case differs essentially from *Doe d. Hubbard v. Hubbard*, and I think we are bound to reject the words of false demonstration. — *Rule discharged.*

HAWKER v. FIELD.¹

Queen's Bench Bail Court, November 6, 1850.

*Quarter Sessions, Enforcing Order of, under 12 & 13 Vict. c. 45 —
Certiorari not necessary.*

When a judge's order or rule of this Court is made under the statute 12 & 13 Vict. c. 45, s. 18, for the removal of an order of Quarter Sessions into this Court, for the purpose of enforcing it, it is not necessary that any *certiorari* should issue to remove the order of Sessions.

THIS was a motion for a rule to remove into this Court an order of a Court of Quarter Sessions of the Peace, with a view of enforcing it.

The application was made under the stat. 12 & 13 Vict. c. 45, s. 18, by which it is enacted, "that in all cases where any order shall be made by any Court of General or Quarter Sessions of the Peace, it shall be lawful for the Court of Queen's Bench, or for any Judge of that Court at chambers, either in term or vacation, upon the application of any person entitled to enforce such order, and upon the production of a copy of such order under the hands of the clerk of the peace or his deputy, and upon proof of refusal or neglect to obey such order, to order and direct such order of the Court of General or Quarter Sessions to be removed into the said Court of Queen's Bench, and thereupon such order shall be of the same force and effect, and may be enforced in the same manner, as a rule made by the said Court of Queen's Bench; and all the reasonable costs and charges attendant upon such application and removal shall be recoverable in like manner as if the same were part of such order."

Unthank, in support of the motion. This, it is believed, is one of the first applications under the statute. The formal requisites of the statute are all complied with; but a doubt exists on the point of practice respecting the necessity of obtaining a writ of *certiorari* to bring the order of Quarter Sessions into this Court before it can be enforced. It is submitted that no *certiorari* is necessary; but that by virtue of the statute a rule of this Court, or a Judge's order, ordering the removal of the order of Sessions is sufficient, *ipso facto*, to remove it; and that when such rule or Judge's order is made, the order of

¹ 20 LAW J. Rep. (N. S.) M. C. 41.

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Sessions may thereupon be enforced as a rule of this Court. The question is very important on the ground of expense and delay.

[PATTESON, J. In the case of *The Queen v. The Justices of Devonshire* 3 L. M. & P. 520, which was a similar application, my brother Wightman, last term, thought the formal course was to remove the order of Quarter Sessions by *certiorari*. I do not, however, find that the learned Judge expressed any opinion that the *certiorari* was absolutely necessary.]

The stat. 1 & 2 Vict. c. 110, s. 22, by which it is provided that a judgment or rule of an inferior court of record may be removed into one of the superior courts by an order of a Judge of the superior court, and thereupon enforced as a judgment or rule of the superior court, is expressed in very similar terms to those of the section under consideration. The effective words of sect. 22, of the 1 & 2 Vict. c. 110, are, "it shall be lawful," &c., "for the Judges of any of her Majesty's superior courts," &c., "to order and direct the judgment of such inferior court," &c., "to be removed into the said superior court;" "and immediately thereupon such judgment," &c., "shall be of the same force, charge, and effect, as a judgment recovered in," &c., "such superior court." Under this act the practice has been to remove without any *certiorari*. The stat. 19 Geo. 3, c. 70, s. 4, which was framed for the like purpose of enforcing the judgments of inferior courts of record by process of the superior courts, is differently worded. There, it is enacted that "it shall be lawful," &c., "for any of his Majesty's courts of record at Westminster," &c., "to cause the record of the said judgment to be removed into such superior court." Under this latter statute the practice has been to remove the judgment of the inferior court by *certiorari*. The common law mode of removing an order of Quarter Sessions is by *certiorari*, but the stat. 12 & 13 Vict. c. 45, gives, it is submitted, a new method. — *Cur. adv. vult.*

PATTESON, J., now said, I have considered the point as to the practice in this case, and spoken to several of the other Judges about it. We think that the terms of the act of Parliament are sufficient to introduce a new practice, and that no *certiorari* is necessary. — *Rule granted.*

REGINA v. THE JUSTICES OF MIDDLESEX.¹

Queen's Bench Bail Court, November 11, 1850.

Appeal, Notice of — Order of Removal — Signed by the Attorney.

A notice of appeal against an order of justices for the removal of a pauper may be signed and given by an attorney on behalf of the parish officers of the appellant parish.²

¹ 20 Law J. Rep. (N. S.) M. C. 42.

² The same point was decided in the full Court of Queen's Bench in the case of *The Queen v. Carew*, (ante, 304.) The same point had also been previously determined in *The King v. The Justices of Monmouthshire*, 6 Ad. & E. 607, note (c); s. c. 7 Law J. Rep. M. C. 95.

Regina v. The Justices of Middlesex.

THIS was an application for a *mandamus* to the Justices of Middlesex to enter continuances, and hear an appeal against an order of Justices, for the removal of John Shuttleworth, from the parish of St. Marylebone, in the county of Middlesex, to the township of Leeds, in the West Riding of Yorkshire.

The following notice of appeal, on behalf of the parish officers of Leeds, was duly served on the parish officers of St. Marylebone: "To the church-wardens and overseers of the poor of the parish of St. Marylebone, in the county of Middlesex. As attorney for, and on behalf, and at the request, and by the direction of the overseers of the poor of the township of Leeds, in the West Riding of Yorkshire, I do hereby give you notice that they do intend, at the next General Quarter Sessions of the Peace," &c., "to enter an appeal against a certain order, bearing date the 4th of January, 1850," &c., "for the removal of John Shuttleworth, from the said parish of St. Marylebone, to the said township of Leeds," &c. "As witness my hand this 28th day of January, 1850. Yours, &c., Charles Naylor, attorney, acting for and on the behalf of the overseers of the poor of the said township of Leeds."

On the appeal coming on to be heard, the counsel for the respondents objected, that a notice of appeal, signed by the attorney for the appellant parish, was an insufficient notice. The Court of Quarter Sessions held the objection valid, and dismissed the appeal.

Huddleston showed cause. A notice of appeal signed by the attorney of the appellant parish is insufficient. The stat. 9 Geo. 1, c. 7, s. 8, which imposes the necessity of giving a notice of appeal, says, that no appeal shall be proceeded with "unless reasonable notice be given by the church-wardens or overseers of the poor of such parish and place who shall make such appeal." The notice, therefore, ought to have been signed by the church-wardens or overseers, not the attorney. In *The Queen v. Catteral*, 5 Q. B. Rep. 901, the point was raised, but not decided. The case of *The King v. Kimbolton*, 6 Ad. & E. 603; s. c. 6 Law J. Rep. (N. S.) M. C. 90, is precisely in point. It was held, that sending the statement of the grounds of appeal to the attorney for the church-wardens and overseers of the respondent parish was insufficient; and Littledale, J., there said, "It is clear that, under sect. 79, a notice sent by the attorney would not be enough, for it is to be sent by three or more of the guardians;" and, again, he adds, "By stat. (U. K.) 41 Geo. 3, c. 23, s. 4, notices of appeal are to be signed by the person giving the same, or his attorney on his behalf; but they are to be delivered to or left at the abodes of the church-wardens and overseers, or any two of them. Here we see the legislature recognizing the distinction between the party giving the notice and the party receiving it; the notice may be given by the attorney, but not received by him: where no distinction is expressed, I think the rule must be uniform." The stat. 12 & 13 Vict. c. 45, (Baines's Act,) expressly provides that the notice may be given by the attorney. When the statute is silent, it is apprehended that the notice must be given by the party himself. The statute in question does not contemplate the intervention of the attorney at that stage of the proceedings with respect

to the order of removal. Secondly, it was not shown that the attorney who signed the notice was authorized to do so by the church-wardens and overseers of the appellant parish. *The Queen v. The Justices of Surrey*, 5 Q. B. Rep. 506; s. c. 13 Law J. Rep. (N. S.) M. C. 86, and *The King v. The Justices of Salop*, 4 B. & Ald. 626.

Hall and Pashley, in support of the rule. With regard to the last point, that no proof was given of the attorney's authority to sign the notice, the answer is, that his authority never was questioned at the Sessions. Had it been disputed, proof would readily have been given by the parish officers of Leeds who were present. Such an objection, therefore, cannot be raised now. As to the first point, the notice need not be signed by the overseers and church-wardens. If signed, as this was, by the attorney on their behalf, it is quite sufficient. There is no provision in the stat. 9 Geo. 1, c. 7, requiring a notice in writing. The Court will not feel at liberty to impose on a party more than the legislature requires. Under stat. 13 Geo. 2, c. 18, s. 5, which provides, that a *certiorari* shall not issue for removing orders of Justices, unless it be duly proved on oath that the party suing out the same has given notice to the Justices that application was intended to be made for the *certiorari*, the practice has always been that the notice should be signed by the attorney. And there are many cases distinctly deciding that a notice so given is good. *The King v. Abergelle*, 5 Ad. & E. 795; s. c. 7 Law J. Rep. (N. S.) M. C. 109. *The Queen v. How*, 11 Ibid. 150. *The Queen v. The Justices of Lancashire*, Ibid. 144; s. c. 9 Law J. Rep. (N. S.) Q. B. 9, and *The Queen v. Cartworth*, 5 Q. B. Rep. 201; s. c. 13 Law J. Rep. (N. S.) M. C. 26. The observation relied on of Littledale, J., in *The Queen v. Kimbolton*, is a mere dictum, and does not apply to this case. A verbal notice of appeal given by the attorney against a bastardy order has been considered sufficient. *The Queen v. The Justices of Huntingdonshire*, 19 Law J. Rep. (N. S.) M. C. 127. The general rule is, that a notice may always be given by the attorney, unless there are some specific words in the act of Parliament requiring the notice, which point to the party himself as the very person who is to give it.

PATTESON, J. Two questions might have arisen upon the notice in this case: first, whether the person professing to give the notice, as the attorney for the appellants, was authorized by them to do so; and, secondly, whether a notice of appeal, signed by the attorney of the parish officers of the appellant parish, was sufficient in point of law. If the respondents had intended to have relied on the first point, the objection ought to have been taken at the Sessions, in order that the appellants might have had the opportunity of proving that the attorney had been authorized by them. As the objection was not then taken, I think it is too late to take it now. On the second question there is no case distinctly in point as to whether a notice of appeal, signed by the attorney of the parish officers of the appellant parish, is sufficient. The general principle is, *qui facit per alium facit per se*. That sanctions the rule that a man may ordinarily give a notice by means of

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his agent or attorney. Where, indeed, it is said in the statute that the notice of chargeability must be given by three or more of the guardians, it is clear that the notice cannot be given by the attorney, for it implies that it is to be a personal act. A notice of chargeability, too, is the proper act of the overseers who know the fact of the chargeability. But I cannot see how this case is to be distinguished from the case of giving notice for a *certiorari* under the stat. 13 Geo. 2, c. 18, in which it has been held, that a notice given by the attorney is sufficient. It is true that in the case of *The King v. Kimbolton, Littledale, J.*, referred to an act of Parliament which provided in terms that a notice might be given by a person or his attorney on his behalf, and relied on the express mention of the attorney; but what is said by way of argument by a Judge, where the point is not raised, must not be pressed too far; and when the case actually comes before the Court for decision, we must recur to first principles. There is a very strong distinction between this case and the case where a notice is to be served upon certain persons. There service on an attorney may well be held insufficient; for how can it possibly be said that the attorney is the attorney of the parties, when there is no case or proceeding in Court at the time? It seems, therefore, to me, that the notice of appeal signed by the attorney was sufficient, and that the Sessions ought to have heard the case. — *Rule absolute.*

REGINA v. THE RECORDER OF DERBY.¹

Queen's Bench Bail Court, November 15, 1850.

*Notice of Appeal — Statement of Grounds of Appeal — Statute
11 & 12 Vict. c. 31.*

The term "notice of appeal," in section 9 of the statute 11 & 12 Vict. c. 31, which provides that no appeal shall be allowed against an order of removal, if notice of such appeal be not given as required by law within a certain specified time, does not in any way apply to the "statement of the grounds of appeal."

THIS was an application for a *mandamus* to the Recorder of Derby to enter continuances and hear an appeal against an order of removal of Joseph Walker, a pauper, from the parish of St. Werburgh, in the borough of Derby, to the parish of Ibstock, in the county of Leicester.

Notice of appeal against the order was given within the time required by the stat. 11 & 12 Vict. c. 31, s. 9; but the statement of the grounds of appeal, though served more than fourteen days before the sessions at which the appeal was intended to be tried, were not served within the period prescribed by the above-mentioned statute for the giving of the notice of appeal. On the appeal coming on for trial, before the Recorder of Derby, the respondents contended that

¹ 20 Law J. Rep. (N. S.) M. C. 44.

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the appellants could not be heard, on the ground that the notice of appeal was insufficient, according to the proper construction of the statute 11 & 12 Vict. c. 31, s. 9, which enacts "That no appeal shall be allowed against any order of removal, if notice of such appeal be not given as required by law, within the space of twenty-one days after the notice of chargeability and statement of the grounds of removal shall have been sent by the overseers or guardians of the removing parish to the overseers or guardians of the parish to which such order shall be directed, unless within such period of twenty-one days a copy of the depositions shall have been applied for, as aforesaid, by the last-mentioned overseers or guardians, in which case, a further period of fourteen days after the sending of such copy shall be allowed, for the giving of such notice of appeal," &c. It was urged that, by this clause, the legislature must be taken to have intended that both the notice of appeal and the statement of grounds of appeal should be given within the time specified for giving the notice of appeal, and that, as the statement of the grounds of appeal, in this case, was not given within such time, the notice of appeal was bad. The learned Recorder, being of opinion that the notice was insufficient, dismissed the appeal on this preliminary objection.

Willmore, for the appellants, in support of the motion. The notice of appeal was given in proper time. The stat. 13 & 14 Car. 2, c. 12, which gives the right of appeal against an order of removal, has no provision respecting any notice of appeal. That is made requisite by stat. 9 Geo. 1, c. 7, s. 8, which enacts that no appeal shall be proceeded with unless reasonable notice of appeal be given. The Sessions had to determine what was reasonable notice. The first enactment respecting the serving any statement of the grounds of appeal is contained in sect. 81 of the stat. 4 & 5 Will. 4, c. 76, which requires that a statement of the grounds of appeal should be delivered together with the notice of appeal, or fourteen days at least before the trial of the appeal. The two documents, therefore, the notice of appeal and the statement of the grounds of appeal, are essentially different, and are recognized as distinct by that section. There is nothing in the language of the recent statute, 11 & 12 Vict. c. 31, to induce the supposition that by the term "notice of appeal," in sect. 9 of that act, the legislature intended to include the statement of grounds of appeal.

Boden showed cause, in the first instance. The stat. 11 & 12 Vict. c. 31, s. 9, enacts, that no appeal shall be allowed, unless such notice of appeal as by law is required shall be given within a certain definite time. That must mean such notice of appeal as by law is required for the purpose of having the appeal heard. When the object of an appellant is merely to enter and respite an appeal, the mere notice of intention to appeal may, perhaps, be sufficient for the purpose of having the appeal entered and respited; but a notice of intention to appeal, unless accompanied or followed by a notice of grounds of appeal, is not such a notice as entitles a party to have his appeal heard. The notice of the intention to appeal and the notice of

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grounds of appeal are, in fact, both parts of the notice of appeal required by law. The stat. 11 & 12 Vict. c. 31, assigns the time when such notice is to be given. Here both parts of this notice of appeal were not given within the required time; and, therefore, the learned Recorder was right in holding the notice of appeal insufficient.

PATTERSON, J. I really feel no doubt at all about the matter. The words used throughout the stat. 11 & 12 Vict. c. 31, respecting the grounds of appeal, are not notice of grounds of appeal, but "statement of grounds of appeal." In order to construe this last act, we must see how the law stood before its passing. Now, previous to this last statute, the notice of appeal and the statement of the grounds of appeal might have been given in different documents and at different times.

In *The King v. The Justices of Suffolk*, 4 Ad. & E. 319; s. c. 5 Law J. Rep. (N. S.) M. C. 3, it was held, that the notice of appeal might be given even after the statement of the grounds of appeal had been delivered. It is to be observed that, in the stat. 11 & 12 Vict. c. 31, a considerable difference is made between the statement of the grounds of removal and the statement of the grounds of appeal. For the act in question says, the notice of chargeability must be accompanied with a statement of the grounds of removal: but there is no direction in the act that the notice of appeal is to be accompanied with a statement of the grounds of appeal. Coming, then, to sect. 9, I do not see how it is possible for me to read the expression "that no appeal shall be allowed against an order of removal, if notice of such appeal be not given as required by law," as intending to include the statement of the grounds of appeal under the term "notice of appeal." It has been argued that the words "as required by law" extend the meaning of the expression "notice of appeal," so as to make it comprehend the statement of the grounds of appeal: but I cannot read those words as meaning to include the statement of the grounds of appeal, when the legislature has always used the expression "statement of the grounds of appeal," and the statement of the grounds of appeal has never hitherto been considered any part of the notice of appeal. Besides, the statement of the grounds of appeal must be in writing, under the hands of the overseers or of three or more of the guardians, and there is no provision that requires that the notice of appeal should be so given. The point seems to me so clear, that I do not see how any question could well be raised upon it. — *Rule absolute.*

Regina v. The Inhabitants of Turweston.

REGINA V. THE INHABITANTS OF TURWESTON.¹

November 28, 1850.

Highway, Non-repair of — Liability of Parish — Indictment — Allegation of Immemoriality — Surplusage — Averment of Time.

An indictment against a parish for non-repair of a highway alleged "that from the time whereof the memory of man runneth not to the contrary, there was, and yet is, a common and ancient highway," &c.; and the only other allegation that it contained as to time was, that a part of the said highway, situate, &c., "on the 1st day of January, in the 12th year aforesaid, and continually afterwards, until the taking of this inquisition, was and yet is" out of repair, so that the liege subjects of the Queen could not during the time aforesaid, nor yet can go, return, pass, &c. —

Held, that the allegation of immemoriality might be rejected as surplusage, and that without it, sufficient appeared on the face of the indictment, as to time, to support the liability charged.

THIS was an indictment for the non-repair of a highway.

The indictment charged "that from the time whereof the memory of man runneth not to the contrary, there was, and yet is, a common and ancient Queen's highway, leading from the village of Turweston, in the county of Buckingham, to the village of Evenley, in the county of Northampton, used by all the liege subjects of our Lady the Queen, and her predecessors, with their horses, coaches, carts, and carriages, to go, return, pass, ride, and labor, at all times of the year, at their will and pleasure; and that a certain part of the same Queen's common highway, situated, lying, and being in the parish of Turweston aforesaid, beginning at, &c., on the 1st of January, in the twelfth year aforesaid, and continually afterwards, until the taking of this inquisition, was, and yet is, in great decay, for want of due reparation and amendment of the same, &c., so that the liege subjects of the Queen could not, during the time aforesaid, nor yet can go, return, pass, re-pass, &c. And that the inhabitants of the said parish of Turweston, in the said county of Buckingham, the common highway aforesaid (so as aforesaid being in decay) ought to repair and amend, when and so often as it shall be necessary."

Plea. Not guilty.

On the trial, before Wightman, J., at the Spring Assizes for Bucks, 1850, the evidence for the prosecution in substance was, that there had been an immemorial highway leading out of the turnpike road towards the parish of Evenley, but that, in the year 1814, the occupiers of the adjoining land had made, in part, a new way, which had been dedicated to and used by the public, and that was the part of the highway in question out of repair. A verdict was found for the Crown, and leave reserved to move to enter a verdict for the defendants, on the ground that the allegation of the highway being immemorial was material, and had not been proved.

A rule *nisi* for that purpose having been subsequently obtained, —

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O'Malley now showed cause. The question is, whether the words "from the time whereof the memory of man runneth not to the contrary" may not be struck out of the indictment as surplusage. To show that those words are material, passages in the judgments of Lord Denman, C. J., and Coleridge, J., in *The King v. The Marchioness of Downshire*, 4 Ad. & E. 232; s. c. 5 Law J. Rep. (N. S.) K. B. 50, are mainly relied upon as an authority. In that case, part of the footway described in the indictment had been recently dedicated, and Lord Denman, C. J., said, "If the whole path were described as immemorial, there would certainly be a variance;" and Coleridge, J., "If the path were claimed as an immemorial highway, I should feel a difficulty; but that is not so." The circumstances of that case are very different from the present, and those *dicta* can be no authority for deciding this question. In 2 Wms. Saund. 158, a, note (d), it is said that an unnecessary allegation of an immemorial highway will be fatal, if it appear that the existence of the highway commenced within legal memory; but the writer of that note would seem to have been misled by the erroneous marginal note of the case of *The Queen v. Westmark*, 2 Moo. & R. 305, cited in support of it. In that case, the allegation of immemoriality was material, to show liability at all, and it was necessary to prove it; but this is an indictment against a parish, and the allegation of immemoriality may be struck out without affecting the liability. The principle of the distinction between the cases is well put by Lawrence, J., in *Williamson v. Allison*, 2 East, 446, acted upon in *The Attorney General v. Clerc*, 12 Mee. & W. 640; s. c. 14 Law J. Rep. (N. S.) Exch. 82.

Wells, on the same side, was not heard.

Prendergast and *Keane*, contra. The allegation that this is a highway is one and the same with that of immemoriality, and the latter, having been alleged, cannot now be rejected as surplusage, any more than the statement of the *termini* can be rejected, although such statement be unnecessarily made. *The King v. St. Leonards*, 5 Car. & P. 579; s. c. 6 Ibid. 582.

[WIGHTMAN, J. That is because the *termini* form part of the description of the highway itself.]

So here, it is part of the description that this is an old highway. The point was taken to be an admitted one in *The King v. The Marchioness of Downshire*. [They referred also on this point to 1 *Russell on Cri.* 480, and *Sutcliffe v. Greenwood*, 8 Price, 535.] The defendants might have been misled in preparing a defence, by considering that this was not to be treated as a highway by dedication. But further, supposing the words to be struck out, there will appear no positive averment of when the way became a public highway. "There was" might apply to a time before Richard the First, and not since.

[ERLE, J. The same might be said of the words "from the time whereof," &c.]

Those words have a well-known technical meaning, and would

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apply to the time since. The subsequent allegation in the indictment of the "1st day of January in the twelfth year aforesaid," does not help, as it is not stated that there was a highway at that time. It does not appear, therefore, that this was a highway during the time it was out of repair.

COLERIDGE, J.¹ This rule ought to be discharged. Any allegation in the indictment which is not matter of description, or necessary to the offence charged, may be struck out. Matter of description, I agree, must be proved; and where there is an allegation which is necessary to make out liability, and the proof fails as to part of it, that will not do, as was the case in *The Queen v. Westmark*. So, in the case of *The King v. Hayman*, Moo. & M. 401, where the liability to repair was alleged to be *ratione tenuræ*, the allegation of the road having been a highway from time out of memory was material, and required to be proved in order to make out the alleged liability. Here it has nothing to do with the defendants' liability, whether the road was dedicated yesterday, or existed from all time. The instant it became a highway, their liability to repair arose. If it could have been shown that by striking out the allegation the indictment would have become insensible, the objection as to time might have been a good one; but it seems to me that has not been done, and that enough appears upon the face of the indictment, reading it altogether.

WIGHTMAN, J. I am of the same opinion. The allegation in question is not a part of the description of the road. The cases as to the necessity for proving the *termini* of a road as alleged, rest on the ground that such an allegation is part of the description itself, and the passages quoted from *The King v. The Marchioness of Downshire* stand on the same ground. I think the present allegation may very properly be rejected as surplusage, and it seems to me that without it there is a sufficient allegation of time to support the indictment.

ERLE, J. It is not material to the liability of the parish to repair, how the road became a public highway. The origin of the highway is quite an immaterial matter here, and a misapprehension as to that has led to the discussion in this case. The rule, I think, must be discharged. — *Rule discharged.*

¹ LORD CAMPBELL, C. J., was sitting at *Nisi Prius*.

 Petre v. Duncombe.

 PETRE, Executrix, v. DUNCOMBE.¹

Queen's Bench Bail Court, January 22 and 28, 1851.

Principal and Surety — Interest.

A surety who is indemnified against all loss by his principal, and who is compelled to pay the debt of his principal, is entitled to interest upon the amount so paid, though interest was not expressly mentioned in the contract between them, and though there was not any demand of interest, and though the claim in respect thereof was not made until many years after payment.

And where the principal had on one occasion allowed the surety interest at the rate of 5l. per cent. on a sum thus paid, it was held no misdirection to leave it to the jury to say whether they would not give the surety interest at that rate in respect of all sums paid by him for the principal under the same contract.

A RULE had been obtained to show cause why the damages assessed on a writ of inquiry before the under sheriff of Middlesex should not be reduced from the sum of 9753l. 9s. 4d. to 6308l. 16s., and why, in the mean time, proceedings should not be stayed. The action was brought by the executrix of the late Hon. E. R. Petre, upon a deed of indemnity executed on the 28th February, 1823, by the defendant and the said E. R. Petre, by which, after reciting that the defendant had granted by deed an annuity of 616l. 13s. 4d. to one Arthur Downes, and that for payment thereof the said E. R. Petre had bound himself as surety, the defendant covenanted to pay the said annuity, and to fulfil and keep all the covenants, stipulations, and agreements in the said annuity deed.² Petre, as such surety for the defendant, having

¹ 15 Jur. 86.

² The annuity deed also contained the following clause: "And it is hereby agreed and declared between the parties to these presents, that the said E. R. Petre, his heirs, &c., shall stand and be possessed and seized of and interested in the said hereditaments and premises comprised in the said term of 500 years, and the said copyhold or customary hereditaments first hereinbefore covenanted to be surrendered, and also of any freehold, copyhold, or customary and leasehold messuages, lands, tenements, and hereditaments which shall or may become vested in him, them, or any of them, in pursuance of the covenant hereinbefore contained in that behalf, respectively, upon and for the trusts, intents, and purposes hereinafter expressed and declared of and concerning the same; that is to say, upon trust that he, the said E. R. Petre, his heirs, &c., do and shall, *by all or any of the ways and means hereinafter mentioned, indemnify and protect himself*, the said E. R. Petre, his heirs, &c., from and against all costs, charges, damages, and expenses which he, they, or any of them shall or may be put to, incur, or sustain for or by reason of his having become surety in manner hereinbefore mentioned for the payment of the said annuity or yearly sum of 616l. 13s. 4d. during the said term of ninety-nine years, and for the observance of the other stipulations and agreements in the said in part recited indenture contained on the part of the said T. S. Duncombe, his heirs, &c., to be observed and performed; for which end, intent, and purpose it is hereby agreed and declared, that in case he, the said E. R. Petre, his heirs, &c., shall be put to, incur, or sustain any costs, charges, damages, and expenses, or be called upon or required to pay any sum or sums of money whatsoever, for or by reason or in consequence of his having become surety in manner hereinbefore mentioned for the payment of the said annuity or yearly sum of 616l. 13s. 4d., and for the observance of the other stipulations and agreements in the said in part recited indenture contained on the part of the said T. S. Duncombe, his heirs, &c., to be observed and performed, then and in such case, and so often as the same shall happen, he, the said E. R. Petre, his heirs, &c., do and shall, *by selling, mortga-*

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paid to Downes at various times the sum of 6308*l.* 16*s.*, this action was brought to recover that sum, together with 3444*l.* 13*s.* 4*d.* for interest. The defendant suffered judgment by default, and on the execution of the writ of inquiry, the under sheriff directed the jury to find a verdict for the principal sums, and interest from the times of the payment thereof at the rate of 5*l.* per cent. by way of damages. In 1840 an account had been stated between Petre and the defendant, in which interest on the various payments was charged at the rate of 5*l.* per cent., and the defendant then signed the following memorandum:—

“The foregoing accounts having been duly examined and compared with the vouchers, and found correct, I hereby allow and confirm the same, and declare the balance due to Mr. Petre to be 7611*l.* 17*s.* 4*d.*, which, with the interest due thereon from the period up to which these accounts are made out, I admit to be recoverable under the trusts of the deed of indemnity, dated the 28th February, 1823.

(Signed) “THOS. S. DUNCOMBE.

“Albany, Aug. 14, 1840.”

No written demand of payment of the principal money, nor any notice that interest thereon would be claimed, had been made upon, or given to, the defendant.

Willes now showed cause. Petre having parted from his money, and lost the use of it, the jury might estimate the damages by the interest payable on that amount. In many cases no interest could be recovered, such as on the common count for money lent; but that was upon the ground that there was nothing to show that it was intended by the parties that interest should be paid. This, however, was not a case of that description; the money was not voluntarily lent to the defendant, nor paid for his use; but the defendant having broken his covenant with Downes, Petre was perforce obliged to part with his money, and he had no opportunity at the time of stipulating for interest upon the amount so paid. It was not a principle of law, that, in all cases of a money demand, there must be a special contract

ging, or otherwise disposing of the said hereditaments and premises comprised in the said term of 500 years, for all or any part of the said term, and of the said copyhold and customary hereditaments first hereinbefore covenanted to be surrendered, and of any freehold, copyhold, or customary and leasehold messuages, lands, tenements, and hereditaments which shall or may become vested in him, them, or any of them, in pursuance of the covenant hereinbefore contained in that behalf, or any part thereof, respectively, or by, with, and out of the rents, issues, and profits of all and singular the said hereditaments and premises respectively, or by bringing actions against the tenants or occupiers of the same hereditaments and premises respectively for the rents then in arrear, or by more than one of, or by all the ways and means aforesaid, or by any other reasonable ways and means, levy and raise such sum or sums of money as the case shall require, or he or they shall think expedient, to pay and apply the same, or any adequate part thereof, in remuneration, satisfaction, and discharge of such costs, charges, and expenses as he, the said E. R. Petre, his heirs, &c., shall be put to, incur, or sustain as aforesaid, or otherwise, by reason of all or any of the matters or things hereinbefore contained, or in any wise relating to the premises, and of any sum or sums of money which he or they shall be called upon or required to pay as aforesaid.”

to pay interest before it could be recovered. Whether interest were recoverable, or not, must depend on the circumstances of each case. *Eddowes v. Hopkins*, 1 Dougl. 376, where it was held, that though, by the common law, book debts do not carry interest, it may be payable in consequence of the usage of particular branches of trade, or of a special agreement, or in cases of long delay under vexatious and oppressive circumstances, if a jury, in their discretion, should think fit to allow it. There is a distinction between money lent, and where a man is kept out of it by default of another party. *De Bernales v. Wood*, 3 Camp. 258. It was a great mistake to say, that because interest could not be recovered on ordinary book debts, money lent, &c., it must be refused in a case where the surety had no choice but to part with his money on the breach of a covenant by his principal. *Farquhar v. Farley*, 1 Moore, 322, cannot be considered as merely a loan. In *Harington v. Hoggart*, 1 B. & Ad. 577, it was held, that a purchaser might recover interest upon a deposit, in the nature of damages, from the vendor, on non-completion of the contract, but not from the auctioneer, who was merely a stakeholder. In *Fergus v. Gore*, 1 Sch. & Lef. 107, Lord Redesdale held, that under a covenant of indemnity a party had a right to claim whatever a jury would give in the shape of damages, in case of an action being brought on the covenant, and that would be the amount of the sums he was compelled to pay, with interest since payment. [He also contended that the account stated between the parties in 1840 established a usage between them to pay interest, and showed their intention to pay it.]

Edwin James and Hance, contra. The under sheriff was wrong in telling the jury they could give interest at the rate of 5l. per cent. by way of damages. There were two questions: the first, whether, on the construction of the covenant, the plaintiff was entitled to interest; and the second, what was the effect of the document referred to as explanatory of the state of things between the parties at the time. If a surety, who pays money under a stipulation of this kind, seek to recover interest upon that payment, he must sue within a reasonable time. Many of the cases were decided on this ground. It could not be the proper construction of this covenant, that the surety might delay making his claim for a period of nearly twenty years, and then recover interest at the rate of 5l. per cent. per annum. The covenant must be looked at to see whether it was the intention of the parties that interest should be paid, and its terms seemed to exclude such an intention. The case of *Fergus v. Gore* merely established, that when the trustees had sold under the power given them by the deed, they might repay themselves interest. Here Petre himself was a grantor of the annuity, there being a separate covenant by both to pay it, although, as between Petre and the defendant, the former was only a surety. There was a great distinction between the right a surety would have to repay himself out of the proceeds of a sale of the property secured to him, and the right of Petre to recover in a personal action on the breach of the contract. Before the 3 & 4 Will. 4, c. 42, there were conflicting decisions in the Courts as to the circumstances under which interest

 Petre v. Ducombe.

should be allowed where there was no contract, and where there was a contract to pay at a day certain. The cases are collected in Chitty on Contracts, 558, 4th ed.; and by sect. 28 of the above statute it is enacted, "that upon all debts or sums certain, payable at a certain time or otherwise, the jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor, at a rate not exceeding the current rate of interest, from the time when such debts or sums certain were payable, if such debts or sums be payable, by virtue of some written instrument, at a certain time; or, if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the time of payment, provided that interest shall be payable in all cases in which it is now payable by law." Here was no contract to pay at a certain time, as between the surety and his principal, whatever there might be as between the surety and the grantee of the annuity. Neither were they within the other alternative of the act, for no demand had been made in pursuance of the terms of the section. *Eddowes v. Hopkins* proceeded on the custom of merchants. By the usage of trade, interest might, no doubt, be payable as in the case of bills of exchange, in which the mercantile law implied a contract to pay interest. In *Hare v. Rickards*, 7 Bing. 254, a distinction is taken between an undertaking to pay the price of goods and a guarantee of the amount of a bill of exchange. [Erle, J. — I am at a loss to know why the guarantee of a bill is in a different position from a guarantee of the price of goods.] The reason is, that the party guaranteeing the amount of a bill must be presumed to know that a bill carries interest according to the custom of merchants. An accommodation acceptor would be entitled to recover the amount of the bill and the interest he had paid, but not interest upon that whole sum from the date of his paying it. [Erle, J. — In the case of an accommodation acceptor the drawer contracts, that, in consideration of the loan of the other's name, he will provide for the bill at maturity. In an action for money had and received, to recover a deposit, the contract for sale of an estate having gone off for want of title, no interest would be recovered; but if you choose to declare specially, you may recover it.] Although that is so, the jury would not be justified in giving 5l. per cent. interest if the claim had not been made for several years; such action should be brought within a reasonable time. If a surety pay interest for his principal, he may recover that, but not interest upon interest; he may recover any sum of money he has actually paid. The document relied on as showing the usage between the parties had reference to an entirely different covenant of the deed, viz., the power which the trustees had, under the deed of indemnity, to sell the property, and repay themselves, but does not render the defendant personally liable. [They also cited *Higgins v. Sargent*, 2 B. & Cr. 348; *Page v. Newman*, 9 B. & Cr. 378; *Foster v. Weston*, 6 Bing. 709; and *Anderton v. Arrow-smith*, 2 Per. & D. 408. 1 Jur. 793.] — *Cur. adv. vult.*

 Petre v. Duncombe.

January 28, 1851. ERLE, J., now gave judgment. In this case the point in dispute was the measure of damages for a breach of covenant, by the principal debtor, to pay a sum of money, whereby the surety became liable and was compelled to pay, the surety contending that he is entitled to interest on the money paid by him. I think, that as the damages awarded are for the purpose of indemnifying him, and as he would be damnified by losing the interest, he is entitled to recover it. This view is confirmed by the cases of *De Bernales v. Wood*, *Farquhar v. Farley*, and *Fergus v. Gore*. The cases of distinct contract for the payment of money are well distinguished, on the ground that the intention of the parties is presumed to be expressed. If interest be due, then comes the question of amount; and I think it was no misdirection on the part of the judge in leaving it to the jury to say whether they would give 5*l.* per cent., considering that the defendant had agreed to such an allowance on a previous settlement with the surety, which was properly received in evidence. It makes no difference whether the interest be obtained from the trust money or otherwise. — *Rule discharged.*¹

¹ A similar decision as to the allowance of interest, from the time of payment by a surety, was made in *Ilsey v. Jewett*, 2 Metcalf, 168, 175. And it seems to be the general rule that, on money paid for, on account of, or at the request of, a third person, interest is allowed from the time of payment, and not merely from the time of notice and demand. See *Gibbs v. Bryant*, 1 Pick. 118. *Hastie v. De Peyster*, 3 Caines, 190. *Weeks v. Hasty*, 13 Mass. 218. In Massachusetts, interest is not

allowed on money lent to a person without any stipulation of interest, until refusal or neglect of payment after demand made, or some other default of the borrower. *Hubbard v. Charlestown Branch Railroad*, 11 Metcalf, 124. So in England, *Page v. Newman*, 9 Barn. & Cres. 378. It seems to have been held differently in Pennsylvania; *Rapelie v. Emery*, 1 Dallas, 349. *Lessee of Dilworth v. Sinderling*, 1 Binney, 488.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS;
AND UPON
WRITS OF ERROR FROM THAT COURT TO THE EXCHEQUER CHAMBER.
COMMENCING MICH. TERM, 14 VICT., A. D. 1850.

DUNN v. WEST.¹

November 8, 1850.

*Arbitration — Award — Set-off of Costs of Action — Attorney's Lien
— Reg. Gen. Hil. 2 Will. 4, s. 93.*

A cause and all matters in difference had been referred to an arbitrator, the costs of the cause to abide the event. The arbitrator found for the defendant, as to the cause, and as to the matters in difference awarded 303*l.* 15*s.* to the plaintiff, to be paid at the same time and place at which the plaintiff was to pay the costs of the action; and the defendant did, at the appointed time and place, pay the sum awarded to the plaintiff's attorneys, minus 180*l.*, the amount of the costs of the action, but refused to pay the residue unless the plaintiff paid the costs of the action.

The plaintiff having become bankrupt after the making of the award, the Court discharged a rule calling upon the defendant to pay the balance of the sum awarded to the plaintiff's attorneys, who had a lien against the plaintiff for more than the amount awarded, for costs incurred by them in the prosecution of the reference.

The rule of Hil. 2 Will. 4, s. 93, only applies to cases in which the Court has a discretion to allow costs or damages of different actions to be set off against each other, and where there has been an application to allow such set-off.

Where an arbitrator has awarded a sum to be paid to A, in respect of matters in difference between him and B, and the costs of the action (a smaller sum) to be paid to B at the same time and place, the Court has no jurisdiction to order B to pay the whole sum awarded to A to A's attorney on account of his lien for A's costs.

THIS was a rule calling upon the plaintiff and his assignees, and upon the defendant, to show cause why the defendant should not pay to the plaintiff's attorneys, Messrs. Robinson & Haines, the sum of 180*l.*, being the balance of 303*l.* 15*s.*, awarded to the plaintiff by the award of an arbitrator.

It appeared from the affidavits that an action and all matters in difference between the plaintiff and the defendant had been referred by order of *Nisi Prius*, which gave the arbitrator power to direct a verdict to be entered for the plaintiff or the defendant, and ordered the costs of the suit to be taxed to abide the event of the award, and

¹ 20 Law J. Rep. (N. S.) C. P. 1. 15 Jur. 88.

that the costs of the reference and award, to be taxed, should be in the discretion of the arbitrator.

The arbitrator by his award found for the defendant in the action, and proceeded as follows: "And I do further award and adjudge that there is now due and owing from the said James West (the defendant) to the said Thomas Dunn, (the plaintiff,) for and in respect of all claims and demands, debts and damages, which he, the said Thomas Dunn, now has or is entitled to receive or recover against, of or from the said James West, upon, for or in respect of the matters in difference between the said Thomas Dunn and the said James West, the sum of 303*l.* 15*s.*, after allowing to the said James West for all claims and demands, debts and damages, which he, the said James West, now has or is entitled to receive or recover against, of or from the said Thomas Dunn, for or in respect of the matters in difference, and which said sum of 303*l.* 15*s.* I do hereby award, order, and direct shall be paid by the said James West to the said Thomas Dunn on the 11th of March next, between the hours of, &c., at the office of Messrs. Robinson & Haines, the attorneys of the said Thomas Dunn, and that, at the same time and place, the said Thomas Dunn shall pay to the said James West the costs which, by the terms of the order of reference, are to abide the event of my award, such costs, in the mean time, to be taxed by the proper officer. And I do further award and direct that the said Thomas Dunn and James West shall each respectively bear and sustain the costs sustained by him in and about this reference. And that the said Thomas Dunn do pay the costs of this my award."

The affidavits further stated that the defendant's costs of the action were taxed at 180*l.*, and that the defendant's attorneys, at the appointed time, called at the office of Robinson & Haines, and tendered 123*l.* 15*s.*, being the balance after deducting those taxed costs from the 303*l.* 15*s.* awarded to the plaintiff. The plaintiff's attorneys refused to accept that sum, stating (what was the fact) that the plaintiff was indebted to them in a larger sum than the whole 303*l.* 15*s.* for their costs and disbursements in and about the reference, and in a larger sum than 123*l.* 15*s.* for the costs and disbursements in and about the conduct of the action. The defendant's attorneys, having paid the 123*l.* 15*s.*, refused to pay the 180*l.* remaining, until the 180*l.* due to the defendant for the taxed costs were paid. Dunn, it appeared, had become bankrupt after the making of the award, and Messrs. Robinson & Haines had become the attorneys of his assignees. It also appeared that while the reference was pending, Messrs. Robinson & Haines gave notice to the defendant that the plaintiff had assigned to them absolutely all benefit to be derived under the award, and this notice was proved upon the reference.

Several cases were cited on moving for the rule *nisi*, and it was contended that *Cowell v. Betteley*, 10 Bing. 432; s. c. 4 Mo. & Sc. 265; 3 Law J. Rep. (N. S.) C. P. 148, was a strong authority in favor of the motion.

Bramwell now showed cause for the defendant, West. This is an

application by the attorneys for payment to them, on account of their lien for work done for the plaintiff, Dunn, of a sum which Dunn himself could not have claimed. As against Dunn, the defendant was entitled to refuse payment of more than 123*l.* 15*s.*, unless Dunn could at the same time pay him the costs of the action which had been decided against him. The attorney cannot have a better right by reason of his lien than his employer has. It is not disputed that the Court will always protect the attorney's lien where there has been fraud or collusion to defeat it. That is the principle of *Read v. Dupper*, 6 Term Rep. 361; *Ormerod v. Tate*, 1 East, 464; *Barker v. St. Quintin*, 12 Mee. & W. 441; s. c. 13 Law J. Rep. (N. S.) Exch. 144; *Gould v. Davies*, 1 Cr. & J. 415; s. c. 9 Law J. Rep. Exch. 111; and *Swain v. Senate*, 2 N. R. 99. The present case is not like that of *Domett v. Helyer*, 2 Dowl. P. C. 540, where it was held, that the plaintiff had no right to set off the judgment in his favor against that which was against him, except on the condition of satisfying the attorney's lien. That was a case within the 93d section of Reg. Gen. Hill. 2 Will. 4, which orders that "no set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought." *Cowell v. Betteley* is not in point. All that that case decided was, that when two causes were referred, the costs to abide the event, the arbitrator could not award the costs to be set off without respecting the attorneys' lien, which would have been protected by the rule of Court, if he had said nothing about the costs. It appears from the report in 10 Bing. 432, that the Court thought the award bad *pro tanto* for awarding as to the costs at all.

[MAULE, J. The report in 4 Mo. & Sc. shows the Court to have proceeded on the ground, that though the parties might have bound themselves so as to give the arbitrator power to set off the costs as between them, they could not defeat by their agreement the right of the attorney to his lien.]

That is so. But in this case the arbitrator has done nothing inconsistent with any rule of Court. Suppose the plaintiff's attorneys were to proceed in their client's name for the recovery of this sum of 303*l.* 15*s.*; the defendant would have an answer to the action under this award. Moreover, in this case it appears that the plaintiff's attorneys were proceeding with the reference for their own benefit, which excludes the supposition of a lien.

Channell, Serj., and *Lush*, in support of the rule. The case falls within the authority of *Cowell v. Betteley*. There the amounts of sums awarded are treated as cross judgments by the Court, and held to fall within the 93d section of Reg. Gen. Hill. 2 Will. 4. That rule is express upon the subject, and *Cowell v. Betteley* shows that it applies to the present case. *Caddell v. Smart*, 4 Dowl. P. C. 760, and *Doe d. Swinton v. Sinclair*, 5 Ibid. 26; s. c. 5 Law J. Rep. (N. S.) C. P. 184, are also authorities for this application. The lien of the attorney is always considered to be paramount to the equitable claims of the parties against each other.

[JERVIS, C. J. This application in fact is in order to obtain a rule of Court, which, under the 1 & 2 Vict. c. 110, s. 18, may be used so as to obtain a judgment by the plaintiff's attorneys, and so change the parties to the suit. *Holcroft v. Manby*, 7 Man. & G. 843; s. c. 13 Law J. Rep. (N. S.) 208.]

In that case the attorney's right was doubtful. As to the supposed assignment, it is but an assignment of a chose in action, and cannot defeat the attorney's lien.

JERVIS, C. J. I am of opinion that this rule should be discharged. An action pending is referred to arbitration, together with all matters in difference between the parties, the costs of the action to abide the event. The arbitrator decides the action for the defendant, and, in accordance with the terms of the reference, orders the verdict to be entered for him; and under the reference of all matters in difference, he orders 303*l.* 15*s.* to be paid by the defendant to the plaintiff at a certain time and place, and at the same time and place orders the plaintiff to pay to the defendant the costs of the action, which in the mean time are taxed at 180*l.* No application has been made to set aside the award; but the defendant having paid the balance, after deducting the costs of the action, at the appointed time and place, an application is now made by the plaintiff's attorneys for a rule directing the remainder to be paid by the defendant to them, on account of their lien for the costs due to them by the plaintiff, and the rule of Hil. 2 Will. 4, is used as an authority for the application. Now, the origin of that rule was this: In applications by parties to be allowed to set off the costs of one action against those of another, the claim of the attorney to a lien for his costs had in the Court of Queen's Bench always been respected. In this Court it had been uniformly neglected. This appears from the case of *Figes v. Adams*, 4 Taunt. 632. In *Hall v. Ody*, 2 Bos. & P. 28, Lord Eldon condemned the practice as it obtained in this Court; and the object of the rule was to render the practice uniform. But in this case it appears to me that there is no application to set off costs, of the kind contemplated by the rule of Hil. 2 Will. 4. I doubt whether we have jurisdiction to make such a rule as that we are here required to make absolute; but at all events the rule of Hil. 2 Will. 4, does not apply. There is, therefore, no authority for this application, and the rule must be discharged.

MAULE, J. If an action were brought by the plaintiff against the defendant upon this award, and a set-off pleaded for the costs in question, unless it would be a good replication to set up the attorney's lien as an answer, I do not see how we can make this rule absolute. I think the case has been distinguished from *Cowell v. Betteley*. If the parties in any case are agreed that it is desirable to provide for the attorney's lien, they should insert a term in the order of reference to that effect. The right is a peculiar one, and only exists by reason of a qualification of the practice which the Court had of allowing equitably a set-off for the costs, upon cross judgments being obtained

Lee, Appellant, Hutchinson, Respondent.

between the same parties, where there was no other mode of adjusting the real claims of the parties upon such judgments. The Court then used to allow such set-off; but it would only give its assistance, protecting at the same time the lien of the attorney. The rule of Hil. 2 Will. 4, only applies to these cases, and where there is no such application, the Court has no right to make a rule to protect the attorney's lien.

WILLIAMS, J. I conceive this in fact to be an application to obtain a rule which may be enforced by attachment against the defendant. We are in substance asked to attach the defendant for disobedience in neglecting to pay the lien of the attorneys, in whose favor no award has been made. That was also the case in *Cowell v. Betteley*, but there the Court had an instrument for assisting the attorney; here we have none.

TALFOURD, J. I cannot see that the Court has any jurisdiction. The rule is only one to regulate the discretion of the Court under certain circumstances, which do not here exist. — *Rule discharged*.

LEE, Appellant, HUTCHINSON, Respondent.¹

November 12, 1850.

Parliament—County Freeholder—Vote of Mortgagor in Possession—Freeholder's Oath—28 Geo. 3, c. 36, s. 6—6 & 7 Vict. c. 18, s. 74.

A mortgagor of freehold premises in possession of the rents and profits is not entitled to be registered as a county voter under 6 & 7 Vict. c. 18, s. 74, unless he receives therefrom 40s. by the year, after deducting money paid annually by him by way of interest on a sum secured by a mortgage which contains no mention of interest, the time for repayment of the principal sum mentioned in such mortgage having expired; such annual payment being in fact a consideration for remaining in possession.

Per Maule, J. — The true construction of the words "over and above the interest of any money secured by mortgage" in the freeholder's oath, 28 Geo. 3, c. 36, s. 6, is, "money secured," not "interest secured."

The following case was stated by the revising barrister for the Eastern division of the county of Surrey.

"1850. Eastern division of the county of Surrey, to wit. At the Court held, &c., John Lee objected to the name of John Henry Hutchinson being retained on the list of voters for the parish of Croydon, in, &c. The facts were as follows: The respondent was registered in respect of freehold land, the value of which was 5*l.* a year, and he was in possession of the estate. The property was mortgaged to secure the repayment of 100*l.* lent to the respondent, but the mortgage did not extend to the interest on the loan. The mortgage was

¹ 20 Law J. Rep. (N. S.) C. P. 4. 14 Jur. 985.

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dated in September, 1846, and recited that the respondent was indebted to the mortgagee in 100*l.* for money some time previously lent, but that all interest on the same had been paid up to the date of the mortgage. The proviso for redemption was on payment of the principal money only, in September, 1848; and the respondent's covenant was for payment of 100*l.* sterling, in September, 1848. The power of sale became absolute on default in payment of the principal money in September, 1848, and the sole trust as to the proceeds of the sale was, to retain the principal money only, and to pay the balance to the respondent. In every respect the mortgage was made a security for the principal money only; but it was admitted that the respondent had, nevertheless, regularly paid interest on the loan at 5*l.* per cent. per annum from the date of the mortgage to the present time. The appellant contended that the respondent's name ought to be expunged because he had not 40*s.* a year from the land clear of all charges, after payment of the interest on the loan. The respondent urged that the interest was not charged upon the land, but was merely a personal liability; and that therefore his income derived from the estate was not subject to the payment of it. I (the revising barrister) held that there was no charge upon the land, operating in reduction of the annual value to the respondent, so as to affect his right to be registered, and that, as the mortgagee had not taken possession, the respondent was entitled to remain on the register, and I retained his name accordingly. If the Court should be of opinion that the respondent in this case had not a freehold estate of the annual value of 40*s.* clear of all charges, then his name is to be expunged from the list."

Corner, for the appellant. This case is identical in principle with *Copland v. Bartlett*, 6 Com. B. Rep. 18; s. c. 18 Law J. Rep. (N. S.) C. P. 50, which decides that a mortgagor in possession is not entitled to be registered under 6 & 7 Vict. c. 18, s. 74, unless he receives from the estate 40*s.* by the year beyond all charges. Though that section enables the mortgagor to vote, he must still have the estate required by 8 Hen. 6, c. 7. The latter part of the enactment there regarding the qualification of electors is important. "And such as have the greatest number of them that may expend 40*s.* by the year, and above, as is aforesaid, shall be returned by the sheriffs of every county knights for the Parliament." The case shows that 5*l.* a year is paid by the mortgagor, which is the whole annual value of the estate; and the appellant could not take the oath prescribed by 28 Geo. 3, c. 36, s. 6.

[WILLIAMS, J. What is the annual revenue of the estate?]

[MAULE, J. For how many years' purchase would the estate sell?]

That depends upon a great many circumstances not found in the case; but the facts found sufficiently show that the whole revenue is swallowed up.

Bytes, Serj., for the respondent. The property itself is not charged with the payment at all.

[JERVIS, C. J. We are quite of that opinion. But the question is, What is the value of the respondent's interest after payment of the charge?]

Lee, Appellant, Hutchinson, Respondent.

Upon that point the *onus probandi* is not upon the respondent. It is found that he was in possession of an estate of 5*l.* a year; and it must be shown he is not so still.

[JERVIS, C. J. The act of 2 Will. 4, c. 45, s. 42, (the Reform Act,) makes it necessary for persons objected to to show their titles on the 1st of July preceding, or have their names expunged.]

Then, supposing the *onus probandi* to be on the respondent, the revisor has here found the facts necessary to give a vote. The respondent has a freehold estate "to the value of 40*s.* by the year, at the least, above all charges," within 8 Hen. 6, c. 7; and though 100*l.* is charged upon the estate, he may have 40*s.* to "expend" out of the estate.

[MAULE, J. We cannot tell from the case whether the estate is charged for more than its value or not. The annual value only is found.]

It is found that the estate is worth 5*l.* a year, and that the respondent has the rents and profits. Therefore he has an estate of the required value, and receives upwards of 40*s.* a year. The statute 28 Geo. 3, c. 36, s. 6, shows he could have taken the freeholder's oath, which in *Copland v. Bartlett* is held to be the test.

[MAULE, J. Not exactly so. It is not held that if he is able to take it, he is necessarily able to vote, though if he is not able to take it, that may be ground for saying that he is not able to vote.]

At all events he might take it, having an "estate of the clear yearly value of 40*s.* over and above the interest of any money secured by mortgage upon the said estate." Here no interest is secured by the mortgage.

[MAULE, J. That may mean *money secured*, not *interest*.]

Corner, in reply. The respondent was bound to prove affirmatively that he had the required estate on the 1st of July last, which he has not proved. The case finds "that it was admitted" that he had regularly paid 5*l.* yearly, which is found to be the whole annual value of the estate.

[JERVIS, C. J. The difficulty is, that we cannot see what the value of the estate was.]

If it should be necessary, the case may be restated; but the revisor has clearly decided in favor of the vote on the ground that this payment ought not to be deducted as a charge within the 6 & 7 Vict. c. 18, s. 74, and it is submitted that it sufficiently appears that if this sum is to be deducted, the estate is worth nothing to the respondent.

JERVIS, C. J. Upon consideration, I think it is not necessary for us to have the case amended, and that our judgment should be against the respondent, on the ground that he has not a clear freehold estate in land of the value of 40*s.* a year. He is owner as mortgagor in possession of an estate in land of the value of 5*l.* a year. That estate is mortgaged for 100*l.* Upon that sum he has regularly paid 5*l.* for interest every year. The time for payment has expired. No mention of interest is made in the mortgage. Now, if this is a charge on the estate within the meaning of the statutes cited, then the interest

of the respondent in the estate amounts to nothing. The question is, whether the respondent had an estate of 40s. by the year at least, above all charges. I may observe, in the first place, that, whether this interest be a charge or not, the 100*l.* clearly is a charge upon the estate. That is, therefore, clearly a deduction from the value of the estate; and it might be doubtful, taking that alone into consideration, whether the respondent has or has not an estate of the clear annual value of 40s. But to decide that question, the whole value of the estate would have to be found. This, however, in my present view of the case, I consider unnecessary. From *Copland v. Bartlett* it is clear that the payment of interest on a mortgage is to be considered as a deduction from the annual value of the estate. The question, however, is, In what manner are we to ascertain the extent to which the payment of interest here goes in reduction of the annual value of the estate? In most cases, such payment of interest would in effect be made in consideration of the mortgagor remaining in possession of the estate. We think, from the facts stated in the case, that we are justified in considering this payment of interest to amount to a payment of 5*l.* per annum for the possession of the estate. If so, does that not satisfy the terms of 8 Hen. 6, c. 7, and make it a "charge" of 5*l.* per annum within the meaning of that statute? I think it does. The freeholder's oath, in 28 Geo. 3, c. 36, explains the estate which is required. What annual interest, then, has the respondent in the estate after deducting the payment? His interest amounts to nothing. He has, therefore, failed to establish that he has "freehold land or tenement to the value of 40s. by the year at the least, above all charges," and his name must be expunged.

MAULE, J. I also am of opinion that the decision of the revising barrister in this case must be reversed. In construing this case, I think we ought not to treat it as a pleading specially demurred to, but to put a reasonable construction upon it. It appears that there had been a loan of 100*l.* The case states that there was a mortgage to secure the principal sum lent. It states that all interest at that time had been paid, and that from the time mentioned in the mortgage for the repayment of the 100*l.* interest has been regularly paid at 5*l.* per cent. I think, therefore, that the Court is justified in inferring that there was a contract on the part of the respondent to pay interest at 5*l.* per annum, and that this is a contract to pay 5*l.* per annum interest on money secured by mortgage on the estate. Stat. 28 Geo. 3, c. 36, s. 6, adds a requisition to those of former acts. In order to satisfy that requisition, the claimant here would have to swear that he has an estate of the clear yearly value of 40s. after all payments of interest on any money secured by mortgage on this estate. It seems to me perfectly clear that the word "secured" refers to "money," and not to "interest." But if it referred to "interest," still the oath would mean that such interest had been deducted from the value of the estate. The construction we put upon the acts is quite consistent with the ordinary rules of construction; and, looking at the spirit of the acts, it is clear that it was to secure persons of a

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certain power of expenditure as voters. If it were held that a person having an estate of 40s. were able to mortgage that estate, and by a different contract agree to pay the full amount of it for continuing in possession, that would defeat the object of all the legislation on the subject, leaving him an interest entirely dependent on the will of another. Therefore, both the spirit and the letter of these enactments lead to the conclusion that this claimant was not entitled to a vote.

WILLIAMS, J. I am of the same opinion. This is an attempt to destroy the effect of the statutes. The spirit of the enactments is to prevent the Courts from taking a strict lawyer-like view of the rights of mortgagor and mortgagee. We must look at the substantial rights of the parties in a popular sense of the words. The state of things in this case is just the same, whether the charge contemplated by 28 Geo. 3, c. 36, s. 6, is confined to the *corpus* of the debt or not. The effect of the doctrine contended for by the claimant is to enable a person who has no real interest in the land to exercise the privilege of voting.

TALFOURD, J. In this case, it appears to me perfectly clear that the respondent only retains the land so long as he pays the mortgagee a sum amounting to the whole value of the estate. And I entirely concur in the observations of my brother Maule, which show that in such a case a person is not entitled to vote. — *Decision reversed.*

COURTENAY v. EARLE.¹

November 18, 1850.

Misjoinder — Contract and Tort — Action of Tort, when maintainable.

The third and fourth counts of a declaration set forth certain promises of the defendant for a good consideration, and not connected with any common law duty arising from the relation between the plaintiff and the defendant, and then alleged a breach of duty in the defendant, consisting solely in the neglect to do the acts which he had by such promises agreed to do, the plaintiff having performed his part of the agreement. The last count was in trover:—

Held, on general demurrer, that the declaration was bad for misjoinder.

The case of *Boorman v. Brown*, 3 Q. B. Rep. 511; s. c. 11 Law J. Rep. (N. S.) Exch. 437, and 11 Cl. & F. 1, does not decide that the neglect to perform a contract is in every case a breach of duty for which an action of tort will lie.

DECLARATION. First count. That before and at the time of the committal of the several *grievances* hereinafter mentioned, the defendant and one Horatio Hammick carried on business in copartnership, under and by the name, style, and firm of Hammick & Earle. That on the 22d day of May, A. D. 1848, the plaintiff accepted and delivered

¹ 20 Law J. Rep. (N. S.) C. P. 7. 15 Jur. 15.

to the said Hammick & Earle, at their request, a certain bill of exchange for 161*l.* 13*s.*, drawn by the said Hammick & Earle upon the plaintiff, and payable to their order three months after the date thereof. That before the said bill became due, to wit, on the 14th of August, 1848, the plaintiff accepted and delivered to the said Hammick & Earle, at their request, who then took and received of and from the plaintiff a certain other bill of exchange for the sum of 94*l.* 10*s.*, drawn by the said Hammick & Earle upon the plaintiff, and payable to their order three months after date, for and on account of so much of the said sum of 161*l.* 13*s.*, and which said last-mentioned bill was duly paid by the plaintiff when the same became due. That the plaintiff, to wit, on the day and in the year aforesaid, and before the said bill for 161*l.* 13*s.* became due, paid to the said Hammick & Earle, who then accepted and received of and from the plaintiff a certain large sum of money, to wit, the sum of 45*l.*, for and on account of the residue of the said bill and sum of 161*l.* 13*s.*, *whereupon it became and was the duty* of the defendant to indemnify the plaintiff, and to provide for, pay, and discharge the said bill for 161*l.* 13*s.*, to the extent and amount of the said two sums of 94*l.* 10*s.* and 45*l.* respectively. Yet the defendant [the count then stated a neglect of the defendant to indemnify the plaintiff at all, and an action brought by the holders of the bill for 161*l.* 13*s.* against the plaintiff, in which the plaintiff was compelled to pay the whole amount, with costs, &c.]

Third count. That before the said bill, so accepted by the plaintiff, for 94*l.* 10*s.*, became due, to wit, on the 27th of October, 1848, the plaintiff, at the request of the defendant and of the said Hammick & Earle, and for their accommodation, and without any valuable consideration other than hereinafter next mentioned, accepted a certain other bill for the sum of 95*l.* 10*s.* 6*d.*, payable to the order of the said Hammick & Earle three months after the date thereof, and *in consideration of such acceptance the defendant then undertook and agreed* with the plaintiff to provide a certain sum, to wit, 50*l.*, in part payment of the said acceptance for the said sum of 94*l.* 10*s.*, at the time when the same became due; nevertheless, the defendant, *disregarding his duty* in that behalf, *did not* nor would, nor would the said Hammick & Earle, *provide* the said sum of 50*l.*, or any other sum or sums in such part payment as aforesaid, but, on the contrary thereof, wholly neglected and refused so to do, although the plaintiff, *on the faith of the said undertaking* to provide the said sum of 50*l.*, delivered to the defendant the said acceptance for the said sum of 95*l.* 10*s.* 6*d.*; yet the defendant did not nor would, nor did nor would the said Hammick & Earle, return or deliver up the said acceptance for the said sum of 95*l.* 10*s.* 6*d.*, or provide for or pay the same when the same became due, whereby the plaintiff lost the said sum of 50*l.*, and was compelled to pay the said amount of the said bill for 95*l.* 10*s.* 6*d.*, to wit, to one R. S., the holder thereof, who sued the plaintiff, &c.

Fourth count. That at the time of the writing by the defendant, and receiving by the plaintiff, of the letter hereinafter mentioned, and before and at the time of the *grievances* hereinafter mentioned, to wit, on the 13th of February, 1849, the defendant and plaintiff had divers

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dealings and transactions together, and there were then outstanding in the hands of one R. S., who was then the holder thereof, two bills of exchange drawn by the defendant and Hammick, under the name of Hammick & Earle, upon, and accepted by, the plaintiff, that is to say, a bill of the 22d of May, 1848, for 161*l.* 13*s.*, payable to the order of Hammick & Earle three months after date; and also a bill of the 27th of October, 1848, for 95*l.* 10*s.* 6*d.*, at three months. And thereupon the defendant, before the committing of the *grievances* hereinafter mentioned, to wit, on the 13th of February, 1849, wrote and sent to the plaintiff a certain letter and *proposal* in the words and figures following, that is to say, —

“196 Piccadilly, February 13, 1849.

“Dear Sir: (meaning thereby the plaintiff,) I (meaning thereby the defendant) called on you to-day, &c. My *proposal* is, that you shall give us a check for 41*l.* 12*s.* 4*d.*, and two bills for the remaining 100*l.*, one at three, the other at four months; or, if it should be inconvenient, your check can be dated a week hence. *If you assent to this, I will engage* to get you back the two bills R. S. now holds, (meaning the said bills for 161*l.* 13*s.* and 95*l.* 10*s.* 6*d.*,) or, failing that, to return you the two bills I contemplate drawing on you.

“I am, &c.

HENRY EARLE.”

Whereupon the plaintiff, afterwards and before the committing of the *grievances*, to wit, on the 13th of March, 1849, wrote and delivered to the defendant a check for the sum of 24*l.* 8*s.* 4*d.* on Hoare & Co., bankers, and then *proposed* to the defendant to reduce the said sum of 41*l.* 12*s.* 4*d.* in the said letter of the defendant mentioned, to the sum of 24*l.* 8*s.* 4*d.*, and that the defendant should accept the said sum of 24*l.* 8*s.* 4*d.* instead of the proposed sum of 41*l.* 12*s.* 4*d.*, and on the terms of the said letter of the defendant; and the plaintiff also sent and delivered to the defendant two bills of exchange for the remaining 100*l.* in the said letter mentioned, according to the intent of the said letter drawn by the defendant and Hammick, under the name of Hammick & Earle, upon *and accepted by the plaintiff for* 50*l.* 3*s.* 6*d.* and 50*l.* 4*s.* 6*d.* at three and four months respectively, (payable to the order of Hammick & Earle.) And the defendant thereupon received the check and its amount from Hoare & Co., and then *consented* to the said proposal, and accepted the said check and its proceeds instead of the said sum of 41*l.* 12*s.* 4*d.*, and also accepted the said two bills for the remaining 100*l.* *upon the terms and conditions* in the said letter and proposal of the defendant, and not otherwise. And it *thereupon became and was the duty* of the defendant to get back, and return and deliver up to the plaintiff, the two bills so held by the said R. S., or to return to the plaintiff the two bills which the defendant so contemplated drawing, and which were so, in fact, drawn on the plaintiff and accepted by him, and delivered to the defendant as aforesaid. *Yet the defendant, disregarding his duty* in that behalf, and although reasonable time in that behalf had elapsed before suit, and though often requested by the plaintiff so to do, did not nor would get back for the plaintiff the two bills so held by R. S., or

either of them, but wholly failed to get back the same, or return or deliver up the same, or either of them, to the plaintiff, and neglected to return to the plaintiff the said two bills, or either of them, which the defendant contemplated drawing, &c., to wit, the two bills for 50*l.* 3*s.* 6*d.* and 50*l.* 4*s.* 6*d.* respectively, and permitted the said bill for 95*l.* 10*s.* 6*d.* to remain outstanding in the hands of R. S., contrary to his duty in that behalf, and also permitted the said bill for 161*l.* 13*s.* to remain outstanding in the hands of Sir P. L. as the holder thereof, and did not return any of the said bills to the plaintiff. Whereby the plaintiff was compelled to pay the said two bills, together with costs, &c., to the said holder.

The last count was in trover. The declaration contained other counts.

To this declaration there was a general demurrer.

Willes, for the defendant.

[WILLIAMS, J. It has been said by some, that since the decision in *Boorman v. Brown*, 3 Q. B. Rep. 511; s. c. 11 Law J. Rep. (N. S.) Exch. 437, affirmed in error in Dom. Proc. 11 Cl. & F. 1, every action for breach of contract is to be considered an action in tort.]

That is a mistaken conclusion. *Boorman v. Brown* did not overrule *Corbett v. Packington*, 6 B. & C. 268; s. c. 5 Law J. Rep. K. B. 142. In that case it was decided that the count which was contended by the plaintiff to be a count in tort, was not so, because it stated an undertaking beyond the common law duty of the defendant. The same is the case here. The third and fourth counts, on the principle there explained, are clearly counts in assumpsit, and it is sufficient to say that the last is a count in trover, in order to show that there is a misjoinder.

Needham, for the plaintiff. *Corbett v. Packington* was cited in *Boorman v. Brown*, which must now be considered the leading authority on this subject. The duty alleged in the third and fourth counts is a duty to perform the contracts set out. There are many cases in which tort or assumpsit will lie at option. The law in this case implies a duty to perform the contracts set out, and it is a breach of duty to neglect to perform them, for which case will lie. In *Boorman v. Brown*, the Queen's Bench arrested the judgment, because the defendant's duty as a broker was not legally stated, nor a breach of such duty shown. But the Exchequer Chamber reversed the judgment, and stated expressly, "We cannot but think that the duty upon the breach, of which this action is founded, arises by necessary inference from the terms of the contract between the plaintiffs and defendants, as set forth in the declaration;" and, further, on "coupling together the terms of the particular contract, made by the defendant, with the terms of the defendant's retainer by the plaintiff, we think it amounts to an express contract on the part of the defendant to deliver what he sold on the payment of ready money only; and that the duty of the broker arose from this express contract, so stated in the declaration, and not simply from his character of broker, which the Court of

Queen's Bench appears to have considered to be the meaning of the declaration." The Court, also, in their judgment in that case, after stating that "the whole question turned on the form of the action brought, and the declaration itself," and after going through the cases on the subject, expressly laid down the law in these words: "The principle, in all these cases, would seem to be, that the contract creates a duty, and the neglect to perform that duty, or the non-feasance, is a ground of action upon a tort."

[JERVIS, C. J. In the House of Lords it seems to have been treated as quite unimportant whether it was an action on contract or in tort.]

[MAULE, J. The House of Lords appears to have proceeded upon the principle that, though a promise to perform a duty is alleged which would be the subject of an action of assumpsit, still, if a man, having undertaken to perform such a duty, commits a breach of duty by *doing* something arising out of such contract, that is the subject of a good count in tort. I do not understand them to say that you might bring an action on the case for the breach of a promise to go to York, on payment of 10*l*.]

[JERVIS, C. J. All the cases cited in *Boorman v. Brown* are cases of a common law duty.]

The Exchequer Chamber there, in effect, say, "There is a contract to do something; therefore not doing it is a tort."

[JERVIS, C. J. The Court does seem to have put it so.]

[MAULE, J. I think the decision did not exactly amount to that. If a man becomes a broker, and also, in his character of broker, enters into an agreement to do that which he is bound as a broker to do under such agreement, although a promise is alleged, the action may be in tort, because he has not only taken upon himself to perform a particular agreement, but a general duty comprehending that duty, which it is alleged he has not done.]

[JERVIS, C. J. Lord Campbell, in 11 Cl. & F. 44, takes that distinction.]

That distinction is not taken in Com. Dig. "Action on the Case for Negligence," a, 4, citing 2 Cro. 262.

[MAULE, J. The action in *Croke* appears to have been in assumpsit, which, for some purposes, is an action on the case, but not for the purpose of joinder.]

Govett v. Radnidge, 3 East, 62, was similar in principle to the present case; and it was there said to be important to consider it an action of tort, to avoid a multiplicity of actions. The same reason applies here, and it would be a great hardship upon the plaintiff to have to bring separate actions for a series of matters so connected together as these are.

Willes, in reply. A line must be drawn somewhere; for it is clear that a count for goods sold and a count for slander cannot be joined. *Boorman v. Brown* only shows that if there be a relation imposing a common law duty, though there be a collateral promise, that does not prevent an action on the case for a breach of such duty. There was there the relation of broker and principal, and the duty of the former

would be to do all that falls within the scope of his employment. The contract there was a contract arising out of his employment as a broker. Here, the promise is a bare promise to do one thing, upon another thing being done by the plaintiff; and, admitting the duty alleged to correspond exactly with the promise set out, the third and fourth counts disclose no duty, except that arising from the bare promise.

JERVIS, C. J. I am of opinion that the defendant is entitled to the judgment of the Court. If *Boorman v. Brown* were an authority to the full extent of all the expressions used in the judgment of the Exchequer Chamber, and by some of the Lords, there is no doubt that the third and fourth counts might possibly be well joined with counts in tort; but the distinction on which those courts proceed is, that wherever there is a duty arising from a general employment, there an action may be brought in tort, although the breach of such duty may consist in doing something contrary to an agreement made in the course of such duty by the party on whom such general duty is imposed. It had before that been supposed that the violation of a bare promise, without any such general duty, was the subject of an action in tort. But that is not so. I think, without overruling the known distinction between actions on contract and actions on tort, we could not hold that there is no misjoinder.

MAULE, J. I also think that judgment must be for the defendant. In the case most in favor of the plaintiff, there was no doubt suggested that there might be counts on *assumpsit*, and counts in case that could not be joined. In the case of *Boorman v. Brown*, Lord Campbell put it as a test, and the counsel for the plaintiff in error admitted, that if the money counts had been added to the declaration, there might have been a demurrer for misjoinder. Now, if there be any case in which a demurrer for misjoinder can be maintained, I think this is the case. There is one count in *trover*. Then there are counts in which the defendant is alleged to have promised to pay money, in consideration of something which would be a good consideration in law. That resembles the case of goods sold and delivered, or a promise to pay money for something agreed to be done, on the terms stated in the agreement. No modern authority has decided that such counts can be joined, and anciently, no doubt, they could not. The older cases may have decided that, if an action be brought in breach of a stipulation, made by one on whom a common law duty is cast, in modification of the duty implied by law, a count on such a breach could not be joined with a count in case. The case of *Boorman v. Brown* has certainly overruled such an opinion, if any such there was. But it was, in that case, expressly admitted that there might be such a thing as a misjoinder; and I think this is one.

WILLIAMS, J. I think we could not uphold this declaration, without deciding that in every action counts in case might be joined with counts in *assumpsit*. That certainly was not the case before *Boorman v. Brown*, and *Boorman v. Brown* does not seem to me to establish any such doctrine.

TALFOURD, J., concurred. — *Judgment for the defendant.*

 Phillpotts v. Phillpotts & another.

PHILLPOTTS v. PHILLPOTTS and another, Executor and Executrix.¹

November 23, 1850.

Parliamentary Law — Splitting Votes — 7 & 8 Will. 3, c. 25, and 10 Anne, c. 23, Effect of Conveyances under — Pleading — Fraud — Estoppel.

In an action on a covenant for the payment of an annuity, the defendant, the grantor, is estopped from pleading that the annuity was granted for the fraudulent purpose of multiplying voices.

The statutes 7 & 8 Will. 3, c. 25, and 10 Anne, c. 23, are to be construed only as affecting the parliamentary law; the 7 & 8 Will. 3, c. 25, invalidated fraudulent conveyances entered into for splitting votes only so far as to prevent the grantee from having a vote, and did not prevent the estate from passing; and the 10 Anne, c. 23, assuming that an estate passed under conveyances, avoided by the statute 7 & 8 Will. 3, c. 25, so far as the right to vote was concerned, made such conveyances free and absolute, notwithstanding secret trusts and conditions of defeasance, only preventing the grantor from voting, under a penalty.

COVENANT by T. G. Phillpotts against J. Phillpotts and F. R. Phillpotts, executor and executrix of the last will of T. G. Phillpotts, deceased, for arrears of four annuities granted by an indenture, dated the 29th of January, 1841, by the testator to the plaintiff.

The defendants craved oyer of the indenture in the declaration mentioned, and it was read to them in these words: This indenture, made the 29th day of January, A. D. 1841, between Thomas Griffin Phillpotts the elder, of the town of Monmouth, in the county of Monmouth, Esq., of the one part, and T. G. Phillpotts the younger, of the town of Newport, in the county of Monmouth, gentleman, (eldest son of the said T. G. Phillpotts the elder,) of the other part, witnesseth, that the said T. G. Phillpotts the elder, for and in consideration of the natural love and affection which he hath and beareth to his son, the said T. G. Phillpotts the younger, also in consideration of the sum of 5s. of lawful money of Great Britain, to the said T. G. Phillpotts the elder, in hand well and truly paid by the said T. G. Phillpotts the younger, at and before the execution of these presents, the receipt whereof is hereby acknowledged, hath given, granted, and confirmed, and by these presents doth give, grant, and confirm unto the said T. G. Phillpotts the younger, one annuity or clear yearly rent-charge or sum of 3*l*. of lawful money of Great Britain, to be charged and chargeable upon and issuing and payable out of all that messuage, smith's shop, garden and orchard, lands, hereditaments, and premises, with the appurtenances, and situate, lying, and being in the parish of Dingeston, in the county of Monmouth, and for many years past in the occupation of Isaac Pritchard, as tenant thereof, to have, hold, receive, and take the said annuity or clear yearly rent-charge or sum of 3*l*. unto and by the said T. G. Phillpotts the younger and his assigns, for and during the term of the natural life of him, the said T. G. Phillpotts the younger, the said annuity to be paid and payable by two half-yearly payments on the

¹ 20 Law J. Rep. (n. s.) C. P. 11.

24th of June and the 25th of December, in every year, without any deduction out of the same or any part thereof; the first payment of the said annuity or clear yearly rent-charge or sum of 3*l.* to be made on the 24th of June next ensuing the date of these presents, if the said T. G. Phillpotts the younger shall then be living. And this indenture further witnesseth that the said T. G. Phillpotts the elder, for the consideration aforesaid, and also in consideration of a further sum of 5*s.* of lawful money of Great Britain to him in hand well and truly paid by the said T. G. Phillpotts the younger, &c., hath given, granted, and confirmed, and by these presents doth give, grant, and confirm unto the said T. G. Phillpotts the younger, one other annuity or clear yearly rent-charge or sum of 3*l.* of like lawful money of Great Britain, to be charged and chargeable upon and issuing and payable out of all that messuage, tenement, or dwelling-house and buildings, garden and premises with the appurtenances, situate, lying, and being on the right-hand side of the road leading from Whitchurch to the Washings and the River Wye, in the parish of Whitchurch, in the county of Hereford, now and for many years past in the occupation of William James, as tenant thereof, and out of and upon them and every of their appurtenances, to have, hold, receive, and take the said annuity or clear yearly rent-charge or sum of 3*l.* unto and by the said T. G. Phillpotts the younger, and his assigns, for and during the term of the natural life of him, the said T. G. Phillpotts the younger, the said annuity or clear yearly rent-charge to be paid and payable by two even half-yearly payments, on the 24th of June, and the 25th of December, in every year, without any deduction out of the same or any part thereof; the first payment of the said annuity or clear yearly rent-charge or sum of 3*l.* to be made on the 24th of June next ensuing the date of these presents, if the said T. G. Phillpotts the younger shall then be living. And this indenture also further witnesseth that the said T. G. Phillpotts the elder, for the considerations aforesaid, and also in consideration of the further sum of 5*s.* of like lawful money of Great Britain to him in hand well and truly paid by the said T. G. Phillpotts the younger, hath given, granted, and confirmed, and by these presents doth give, grant, and confirm unto the said T. G. Phillpotts the younger one other annuity or yearly rent-charge or sum of 3*l.* of like lawful money of Great Britain, to be charged and chargeable upon, and issuing and payable out of all those the great and small tithes of the parish of Llanthew, in the county of Brecon, and also out of the glebe land thereto belonging and appertaining, and situate, lying, and being in the parish of Llanthew aforesaid, to have, hold, receive, and take the said annuity or clear yearly rent-charge or sum of 3*l.* unto and by the said T. G. Phillpotts the younger and his assigns, for and during the lives of the said T. G. Phillpotts the elder, Ann Stokes, of Hen Castle, in the county of Pembroke, widow of the late Thomas Stokes, and Francis Collins, of Swansea, in the county of Glamorgan, and the lives and life of the survivor or survivors of them; the said annuity or clear yearly rent-charge to be paid and payable, by two equal half-yearly payments, on the 24th of June

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and the 25th of December in every year, without any deduction out of the same. And this indenture lastly witnesseth that the said T. G. Phillpotts the elder, for the considerations aforesaid, and also in consideration of a further sum of 5s., &c., hath given, granted, and confirmed, and by these presents doth give, grant, and confirm unto the said T. G. Phillpotts the younger one other annuity or clear yearly rent-charge or sum of 3*l*. of like lawful money of Great Britain, to be charged and chargeable upon, and issuing and payable out of all that messuage, tenement, or dwelling-house, outhouse, building, garden, lands, and premises, situate, lying, and being adjoining the road leading from Hewelsfield to Brockwear, in Brockwear Common, in the parish of Hewelsfield, in the county of Gloucester, late in the occupation of Richard Aston, but now of John Kethro, as tenant thereof, and out of and upon them and every of them, and every of their appurtenances, to have, hold, receive, and take the said annuity or clear yearly rent-charge or sum of 3*l*. unto and by the said T. G. Phillpotts the younger and his assigns, for and during the term of the natural life of the said T. G. Phillpotts the younger, and the said annuity or clear yearly rent-charge to be paid and payable by two even half-yearly payments, on the 24th of June and the 25th of December in every year, without any deductions out of the same or any part thereof; the first payment of the said annuity or clear yearly rent-charge or sum of 3*l*. to be made on the 24th of June next ensuing the date of these presents, if the said T. G. Phillpotts the younger shall then be living. And the said T. G. Phillpotts the elder, for himself, his heirs, executors, administrators and assigns, doth hereby covenant, grant, and agree to and with the said T. G. Phillpotts the younger and his assigns by these presents in manner following; *i. e.*, that if the said annuity or clear yearly rent-charge or sum of 3*l*., or any part thereof, which is hereby charged and made payable on the premises mentioned to be situate in the said parish of Dingeston, in the county of Monmouth aforesaid, or the said annuity or clear yearly rent-charge or sum of 3*l*., or any part thereof, which is hereby charged or made payable on the premises mentioned to be situate in the parish of Hewelsfield, in the county of Gloucester aforesaid, or either of them, shall be in arrear and unpaid by the space of twenty-one days next after any of the said days or times whereon the same ought to be respectively paid as aforesaid, and in either of such cases as often as the same shall respectively happen, it shall and may be lawful for the said T. G. Phillpotts the younger, or his assigns, to enter into and upon all or any of the said messuages, hereditaments, great and small tithes, glebe lands, and premises, hereinbefore charged with the said several annuities or yearly rents or sums of 3*l*. each, and to distrain the said several annuities or yearly rents or sums of 3*l*. each, or either of them, for all respective arrears, or either of them, and to sell and dispose of the distress and distresses then and there taken on them or either of them, or otherwise demean therein, according to law, in like manner as in case of distress taken for rent reserved by lease or common demise, to the end and intent that the said T. G. Phillpotts the younger and his

assigns may be fully paid and satisfied the said several annuities or yearly rents or sums of 3*l.* each respectively, or either of them, and all respective arrears, or either of them, and all costs, charges, and expenses occasioned by the respective non-payment of the same. And the said T. G. Phillpotts the elder, for himself, his heirs, executors, and administrators, doth covenant, promise, and agree to and with the said T. G. Phillpotts the younger and his assigns, by these presents, in manner following, that is, that he, the said T. G. Phillpotts the elder, his heirs, executors, and administrators, or some or one of them, shall and will well and truly pay or cause to be paid unto the said T. G. Phillpotts the younger or his assigns, for and during the natural life of him, the said T. G. Phillpotts the younger, the said several annuities or clear yearly rent-charges of 3*l.* each, making together the sum of 12*l.*, when the same shall respectively become due and payable as aforesaid, without any deduction or abatement whatever, according to the true intent and meaning of these presents. In witness, &c.

The defendants then pleaded that the said indenture in the declaration mentioned was fraudulently and collusively made and executed by and between the said T. G. Phillpotts the elder and the plaintiff for the purpose of multiplying the voices and of splitting and dividing the interest in divers houses and lands, to wit, the houses and lands in the said indenture mentioned, between the said T. G. Phillpotts the elder and the said plaintiff, in order to enable them to vote at elections of members to serve in Parliament for the said several counties of Hereford, Gloucester, Monmouth, and Brecon, in the said indenture mentioned, and that the said indenture was not made *bona fide*, or for a good or valuable consideration, but, on the contrary, was made and executed solely for the purpose of multiplying voices as aforesaid, and under and subject to a secret trust and condition that no estate or interest should pass beneficially to the plaintiff by virtue of the said indenture, but that the plaintiff should stand possessed of the said annuities or rent-charges as trustee for the said T. G. Phillpotts the elder, and not otherwise, and this the defendants are ready to verify, &c.

Replication, *de injuria*.

At the trial before WILDE, C. J., at the Sittings after Trinity term, 1850, the defendants had a verdict.

Channell, Serj., 7th November, obtained a rule *nisi* for judgment for the plaintiff *non obstante veredicto*.

Byles, Serj., and Crompton now showed cause. The plea contains a good answer to the action. This deed was void under the 7 & 8 Will. 3, c. 25, s. 7, which enacts, that "all conveyances in order to multiply voices, or to split and divide the interest in any houses or lands among several persons, to enable them to vote at elections of members to serve in Parliament, are hereby declared to be void and of none effect." If that were the only statute on the subject, it is

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clear that this plea shows sufficient to avoid the deed. Independently of that statute, which was merely declaratory of the common law, this deed was void at common law. *Alexander v. Newman*, 2 Com. B. Rep. 122; s. c. 15 Law J. Rep. (N. S.) C. P. 134, where it is laid down (citing *Lord Somers's Tracts*, vol. 8, p. 275) "that a conveyance made in order or for the purpose of giving a qualification to vote at an election, or for any other purpose, if made with the secret intention and design that it should appear to the world as a conveyance, but as between the parties themselves should pass no interest and have no effect, would be fraudulent and void at common law." See 2 Com. B. Rep. 137, and 15 Law J. Rep. (N. S.) C. P. 140. This is such a conveyance; and being void at common law, is not made valid by stat. 10 Ann. c. 23, s. 1. The principle of *ex turpi causa non oritur actio* here applies.

[MAULE, J., referred to *Sloane v. Packman*, 11 Mee. & W. 770; s. c. 12 Law J. Rep. (N. S.) Exch. 423.]

In that case and the cases there cited, the main object of the deed was right and proper. Here the whole transaction is tainted with fraud. You cannot here maintain the covenant in the deed, without supporting the whole vicious contrivance to defeat the law. The statute of Anne was never intended to give validity to such a transaction.

Channell, Serj., and J. Gray, contra. It is true that Tindal, C. J., in *Alexander v. Newman*, treats the statute of Will. 3 as declaratory of the common law, but only so far as it declares conveyances to be void which are made to give qualifications where they are fraudulent and fictitious. In this case, sufficient effect would be given to the statute of Will. 3, by holding the vote to be bad, but the deed binding. In *Doe d. Roberts v. Roberts*, 2 B. & Ald. 367, it was held, that a deed of conveyance in order to give a colorable qualification to kill game was not void as against the parties to it. Here the defendants, in order to succeed, must set up the fraud of their testator. The object of the statute of Will. 3, was manifestly to prevent multiplied votes in respect of the same tenements. The statute of Anne intended to accomplish the same object more effectually by a different method. The legislature intended to make the conveyance good as against the party, though his vote was bad. The only effect of the statute of Anne is to make this annuity good, and to give the covenant something to operate upon. The object of the legislature is well attained by this view of the operation of the statutes.

JERVIS, C. J. I am of opinion that the plea in this case is no answer to the declaration, and that the judgment ought to be for the plaintiff. The question is, whether the covenant is binding on the parties notwithstanding the circumstances which are stated in the plea, and which in one view of the case might be supposed to avoid the annuity. Before we come to the effect of the statutes, it would be well to consider the question of estoppel. It is difficult to distinguish this case from *Doe d. Roberts v. Roberts*, which shows that

it is possible that such a deed, though bad as regards the law of Parliament, may yet be binding as between the parties; as some deeds are void as against creditors, though binding between the parties. This was the case in *Bessey v. Windham*, 6 Q. B. Rep. 166; s. c. 14 Law J. Rep. (s. n.) Q. B. 7, where the jury found distinctly that the parties meant nothing to pass by the deed; and yet, notwithstanding that finding, the Court held, that the deed operated so as to pass the goods against the party himself and strangers, though it might be void as against creditors, acting on the authority of *Doe d. Roberts v. Roberts*; on the principle of which case the liability of the present defendants may also be supported. But it may likewise be established upon the construction of the acts of Parliament. The statute of Will. 3, is declaratory of the whole then existing law on the subject it refers to. It declares that no more than one vote should be admitted for one house or tenement, and any conveyance made to defeat that parliamentary law was declared by the statute to be void. Now, it would fully carry out the intention of that statute if the grant were held to have no effect to confer a vote, and yet the covenant be held to be good as between the parties to the deed. But the legislature, finding the statute of William to be inoperative, passed the statute of Anne; which defeats such fraudulent conveyances by another expedient. The latter statute provides, that notwithstanding the secret trusts, these conveyances shall be good for all purposes, except that the grantee shall have no vote. The conveyance is to be good as to the estate, but the grantee is prohibited from voting under a penalty. This being so, it is unnecessary now to decide whether such conveyances are void at common law. It seems to me that this deed is binding between the parties, both under the statutes and because a defendant cannot set up his own fraud as a defence.

MAULE, J. I am of the same opinion. It is the defendants, and not the plaintiff, who seek to set up the fraud to which their testator has been a party; and I think that, according to *Doe d. Roberts v. Roberts*, it is not competent for a defendant to set up his own fraud. But even supposing that he could do so, I think that this plea contains no answer to the action. It proceeds on the ground that a covenant to pay money is void, if made in pursuance of such an agreement as must be taken under this plea to fall within the common law declared by the statute of William. The common law, and the statute which is declaratory of it, and also enacting, are confined to matters respecting the voting at elections of members of Parliament. The 7th section of the act says, "Be it enacted, that all conveyances of any messuages, lands, tenements, or hereditaments in any county, city, borough, town corporate, port, or place, in order to multiply voices, or to split and divide the interest in any houses or lands among several persons, to enable them to vote at elections of members to serve in Parliament, are hereby declared to be void and of none effect, and that no more than one single voice shall be admitted for one and the same house or tenement." The question then

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is, What is the effect of this act of Parliament? It does not use the words commonly used in acts avoiding instruments. It does not say that the deed is to be void, but the conveyance; it does not say that it is to be void to all intents and purposes. It only says the conveyance is to be void, and no more than one voice is to be allowed. Effect, therefore, would be given to this statute by holding the deed to be void for the purpose of giving a vote. The spirit of the act does not require us to go further, nor do the words. The words apply to avoiding conveyances so far as regards their fraudulent effect. Such was the state of the law for about sixteen years — from the 7 & 8 Will. 3, to the 10 Anne. The statute of Anne recites that notwithstanding this statute of William, many fraudulent and scandalous practices prevailed, and for preventing such practices it does not make any thing void, but makes the conveyances more binding than they were before. This throws light upon the statute of William, the true construction of which seems to be that it invalidated these conveyances as far as regarded the right of voting, but left them valid as to the purchase, and also as regarded the grantor. The legislature, finding that by avoiding the conveyances only to the extent of taking away the vote, but leaving the rest of the deed in effect, as for instance, *inter alia*, leaving the condition as to reconveyance in force, they did not effectually prevent fraudulent practices, enacted by the statute of Anne, that if such fraudulent instruments contain conditions and stipulations for defeasances, the conveyances shall nevertheless be taken to be free and absolute. That provision seems to assume that the construction I have put on the statute of William is the correct one. It assumes that, by the statute of William, the conveyance was sufficient to pass the property; and leaving that as it was, it makes the conditions void and the estate absolute. I think, therefore, that the true construction of these acts is, that they deal with the subject of parliamentary law only, that they prevent persons from voting, who, according to the policy of the common law, ought not to vote, but leave all provisions not affecting that matter untouched. I think, therefore, that if the defendants had a right to set up this plea, which they had not, it would have been no answer to the action.

WILLIAMS, J. I also am of opinion that the plaintiff is entitled to judgment, notwithstanding the verdict for the defendants upon the plea. By that plea the defendants allege that it was understood that the covenant should not be operative. If so, this case falls within the authority of *Doe v. Roberts*, and *Bessey v. Windham*, which show that they are not entitled to set up such a defence. It is, therefore, unnecessary to say any thing upon the construction of the statutes.

TALFOURD, J., concurred. — *Rule absolute.*

REGINA, on the Prosecution of DAVIS v. MILL.¹

November 16 and 18, 1850.

Patent — Scire Facias — Evidence — Disclaimer — Objections filed under 5 & 6 Will. 4, c. 83, s. 5 — Construction of s. 1.

A declaration in *sci. fa.* to repeal a patent "for improvements in instruments used for writing and marking, and in the construction of inkstands," contained suggestions, alleging want of novelty and utility in "a certain part" of the said invention; and that the defendant had not properly described the "said" invention, &c. The pleas denied all the suggestions in the declaration.

Objections were filed with the declaration under the 5 & 6 Will. 4, c. 83, s. 5, specifying (*inter alia*) claim No. 6, in the specification, as objected to for want of novelty and utility.

After issue joined, the defendant procured to be enrolled a disclaimer under the 5 & 6 Will. 4, c. 83, s. 1, disclaiming (*inter alia*) the claim No. 6.

The claims not disclaimed were for improvements in pen-holders and pencil-cases, and in the construction of inkstands. Those disclaimed were for pens, and instruments used for marking with a stamp:—

Held, first, that such disclaimer, though enrolled subsequently to issue joined, was admissible for the defendant, and to be read as part of the original specification put in by the prosecutor.

Secondly, that it was not necessary to plead the disclaimer *puis darrein continuance*.

Thirdly, that the objections filed with the declaration under the 5 & 6 Will. 4, c. 83, s. 5, are not part and parcel of the record, so as to be incorporated with the issues, and show that those specific objections are in issue; and that, therefore, it could not be taken that issue had been joined upon the objections which went to the disclaimed parts of the invention, and that those issues must therefore be tried.

Fourthly, that the disclaimer, being admitted, proved the issues as to a "certain part" of the invention not being new or useful, in favor of the defendant, the prosecutor at the trial having abandoned all objections except to the sixth claim in the specification, which had been disclaimed.

Fifthly, that the title of the patent as regarded "instruments used for writing and marking" was satisfied by the inventions for improvements in pen-holders and pencil-cases, which may be described as instruments used for writing and marking with pens and pencils.

Semle, in actions or suits, not being proceedings by *sci. fa.*, and which were not pending at the time of the enrolment of a disclaimer under the 5 & 6 Will. 4, c. 83, s. 1, the disclaimer is to be deemed and taken to be a part of the patent or specification from the time of the granting of the letters patent, and not from the time of its enrolment only.

The decision in *Perry v. Skinner*, 2 M. & W. 471, questioned by the Court; and *quære*, whether it can be reconciled with their construction of sect. 1.

SCIRE FACIAS. The declaration, dated the 7th of January, 1850, recited the grant of letters patent of the 29th of June, 1846, to the defendant for an invention of "improvements in instruments used for writing and marking, and in the construction of inkstands." And after setting out certain of the provisoes in the said letters patent contained, proceeded as follows: "And whereas we are given to understand that the said grant was contrary to law in this, to wit, that *a certain part* of the said invention was not nor is the working or making of any manner of new manufacture. And, also, that the said grant was and is prejudicial and inconvenient to our subjects in general in this, to wit, that *a certain part* of the said invention was and is useless.

¹ 20 Law J. Rep. (n. s.) C. P. 16. 15 Jur. 59.

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And also, that the said William Mill was not the first and true inventor of the *said* invention within this realm. And, also, that the *said* invention was not, at the time of making the said grant, a new invention as to the public use and exercise thereof in England and Wales, &c. And, also, that the *said* invention was not invented and found out by the said William Mill. And, also, that the said William Mill did not particularly describe and ascertain the nature of the *said* invention, and in what manner the same was to be performed, by an instrument in writing, under his hand and seal, and cause the same to be enrolled in our said High Court of Chancery within six calendar months of the date of the said letters patent. By means of which said several premises, the said letters patent were, and are, and ought to be void, and of no force or effect in law. And we being willing," &c., (conclusion in the usual form.)

Pleas (of Hilary term, 1850.) First, as to the first suggestion in the said writ, that the *said* part of the said invention, in the said first suggestion mentioned, was and is the working and making of a manner of new manufacture. Secondly, as to the said second suggestion, that the *said* part of the said invention, in that suggestion mentioned, was not nor is useless. Thirdly, as to the said third suggestion, that he, the said William Mill, was the first and true inventor of the *said* invention in this realm. Fourthly, as to the said fourth suggestion, that the *said* invention was, at the time of making the said grant, a new invention as to the public use and exercise thereof in England and Wales, &c. Fifthly, as to the said fifth suggestion, that the *said* invention was invented and found out by the said William Mill. Lastly, as to the said sixth suggestion, that the said William Mill did particularly describe and ascertain the *said* invention, and in what manner the same was to be performed by an instrument in writing, under his hand and seal, and did cause the same to be enrolled, in the said Court of Chancery, within six calendar months of the date of the said letters patent.

Upon all these pleas issue was joined, in the same Hilary term, 1850.

The plaintiff had filed with his declaration a notice of the objections on which he meant to rely at the trial, as required by the 5 & 6 Will. 4, c. 83, s. 5, and such notice, amongst other objections, contained one to the sixth part of the plaintiff's invention as described in the specification, and to the claim in respect thereof, stating that such part of the invention was old and useless.

At the trial, before Wilde, C. J., at the sittings, after Trinity term, 1850, for Middlesex, the letters patent, the specification, and the above-mentioned notice were put in evidence for the prosecution. The letters patent were dated the 29th of June, 1846, and purported to be letters patent for an invention, by the defendant, of "improvements in instruments used in writing and marking, and in the construction of ink-stands." The specification was enrolled the 28th of December, 1846, and set out eleven different heads of invention, which were fully described in the specification, of which the following are the material parts: "The

first part of my invention relates to improvements in ever-pointed pencil-cases." "What I claim with respect to this first part of my invention is, the enclosing a movement, such as is shown in figure 1, in a case, and the arrangements for working the same, as described; and with respect to the spring point, I do not claim the slitting the points of pencil-cases, being aware that such points have been slit before; but what I claim is, the forming or arranging of slit points for ever-pointed pencil-cases in the manner before described; which improvement I claim for ever-pointed pencils in general." "The second part of my invention consists in an improvement in pen-holders." "What I claim with respect to this second part of my invention is, the forming of holders for pens with spring or yielding inside supports or bearings for pens, as herein described." "The third part of my invention also applies to pen-holders." "The fourth part also relates to pen-holders, such as are generally denominated Bramah pen-holders." The fifth and sixth parts of the invention were described as relating to pens. The fifth claim was the arranging the spring (described) so as to support the ink in the pen, and at the same time to allow it to flow freely. The sixth claim was a particular mode of notching the pens. The specification then proceeded: "The seventh part of my invention relates to the construction of instruments for marking, with a holder for the same combined, forming an apparatus for marking many changes of dates, numbers, mottoes, letters, devices, or other marks or impressions, with the said apparatus." "What I claim in respect of this seventh part of my invention is, the construction of an apparatus for marking, as hereinbefore described." "The eighth part of my invention relates to the forming of instruments for marking, of such novel and peculiar shape, that several different devices, figures, letters, mottoes, &c., may be marked on sealing-wax, or any other material capable of being marked or impressed with such instrument." "What I claim with respect to this eighth part of my invention is, the forming of marking instruments of metal, glass, or other suitable material, as herein described." The ninth, tenth, and eleventh parts of the invention and claims, in respect of them, related to improvements in ink-stands.

The counsel for the prosecution then stated that he should rely only upon one of the objections contained in the notice filed with the declaration; viz., that to the sixth claim of the defendant, "for a particular method of notching pens;" which he should prove to be old and useless, as pointed out in the objection.

The counsel for the defendant admitted that he could not support the novelty or utility of that part of the invention, and that if the case were to rest there, the verdict must be for the Crown; but he offered in evidence a disclaimer of parts five, six, seven, and eight of the invention, and of the claims in respect of those parts, as mentioned in the specification; which disclaimer had been entered, filed, and enrolled, according to the 5 & 6 Will. 4, c. 83, s. 1; and contended that, upon reading such disclaimer, it would appear that the defendant's patent and specification were free from the objection relied on, inas-

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much as the disclaimer and specification were to be read together as the original patent, according to the above section ;¹ and therefore the patent did not make any such claim as that to which the prosecutor now objected. The enrolment of the disclaimer was not until the 23d of April, 1850, after issue joined. The following are the material parts of the disclaimer : " I, the said William Mill, in my said specification, did describe my said invention to consist of eleven parts ; and since the enrolment of the said specification, several parts of the said invention have come into extensive public use, whilst several other parts thereof have come but little into public use ; and I have been advised that there may be some doubts whether the validity of the said letters patent may not be injured by reason of the comparatively small extent of public utility of some parts of my said invention. For which reason, and also for the further reason that I wish to avoid the otherwise necessary expense of proving them to be useful in a court of law, I wish to disclaim, and I do hereby disclaim, all those parts of my said invention which are respectively described and claimed in the said specification as being the fifth, the sixth, the seventh, and the eighth parts of the said invention. In witness whereof," &c.

The learned Judge expressed a doubt whether the disclaimer was admissible in evidence, and whether it ought not to have been pleaded, to render it admissible ; and intimated an opinion that he was bound to try the issues as joined, upon the validity of the patent at the time of joining issue. He directed a verdict for the Crown upon all the issues, and gave the defendant leave to move to enter a verdict for him if the disclaimer was admissible, and, when admitted, sufficient to entitle him to a verdict.

¹ 5 & 6 Will. 4, c. 83, s. 1, enacts : " That any person who hath obtained or shall hereafter obtain letters patent for the sole making, exercising, vending, or using of any invention, may, if he think fit, enter with the clerk of the patents, having first obtained the leave of his Majesty's Attorney or Solicitor General, certified by his fiat and signature, a disclaimer of any part of either the title or specification, stating the reason for such disclaimer ; and such disclaimer, being filed by the said clerk of the patents, and enrolled with the specification, shall be deemed and taken to be part of such letters patent or such specification in all Courts whatever : Provided always, that any person may enter a caveat, in like manner as caveats are now used to be entered, against such disclaimer, which caveat, being so entered, shall give the party entering the same a right to have notice of the application being heard by the Attorney or Solicitor General : Provided also, that no such disclaimer shall be receivable in evidence in any action or suit (save and except in any proceeding by *sci. fa.*) pending at the time when such disclaimer was enrolled, but in every such action or suit the original title and specification alone shall be given in evidence and deemed and taken to be the title and specification of the invention for which the letters patent have been or shall have been granted."

Sect. 5. enacts : " That in any action brought against any person for infringing any letters patent, the defendant, on pleading thereto, shall give to the plaintiff, and in any *sci. fa.* to repeal such letters patent, the plaintiff shall file with his declaration a notice of any objections on which he means to rely at the trial of such action, and no objection shall be allowed to be made in behalf of such defendant or plaintiff respectively at such trial, unless he prove the objections stated in such notice : Provided always, that it shall and may be lawful for any judge at chambers, on summons to show cause why such plaintiff or defendant should not be allowed to offer other objections whereof such notice shall not have been given, to give leave to offer such objections on such terms as to such judge shall seem fit."

A rule having been obtained accordingly, —

Butt and Webster (November 16, 18) showed cause. The disclaimer was not admissible in evidence. It was not enrolled till the issues had been joined. Those issues were joined upon the validity of the patent as it then stood. The objections specified in the notice filed with the declaration, according to sect. 5, of 5 & 6 Will. 4, c. 83, some of which were pointed at the parts of the invention afterwards disclaimed, were incorporated with and formed part of the issues. When the pleas mention "the said part," they mean "the part specified in the objections." Lord Denman, C. J., in the case of *The Queen v. Thornton*,¹ under similar circumstances, held that he could only look to the issues as joined. The disclaimer, therefore, cannot possibly be admissible to alter the issues joined before it was in existence. But assuming that the effect of the 1st section of 5 & 6 Will. 4, c. 83, is to make a disclaimer enrolled subsequently to issue joined admissible at all on a trial of a *sci. fa.*, that can only be where it has been pleaded *puis darrein continuance*. The prosecutor in these cases is obliged to give security for costs, and it cannot be supposed that the legislature meant to enable a defendant, after issues have been joined upon the original patent and specification, to put the prosecutor out of Court at the trial by producing a disclaimer, to which his attention had never been called by the pleadings, and make him liable to the costs of the issues so proved. If the disclaimer has the operation contended for by the defendant, it ought to be pleaded *puis darrein*, so that the prosecutor may discontinue upon having it brought to his notice. This disclaimer was then inadmissible; and that being so, the verdict for the Crown was right; for the specification, as it was produced, was confessedly bad as regarded the sixth claim; which was admitted by the defendant to want novelty and utility. Supposing, however, that the disclaimer was admissible, the question is, whether it could have a retrospective operation so as to affect the rights of the parties from a time antecedent to its enrolment. If not, the only effect of its admission was to prove the case of the Crown, as regards the issues upon the novelty and utility of the invention; because it shows that at the time of issue joined, a part of his invention, viz., his sixth claim, was not useful or novel. If it had a retrospective operation, then it proves the sixth issue against the defendant; for, if the parts disclaimed are to be considered as struck out of the original specification at the time of its enrolment, the specification does not correspond with the title; the title being "Improvements for instruments used for writing and marking, and in the construction of inkstands," and the claims for instruments used in marking being all struck out. *Croll v. Edge*, 19 Law J. Rep. (N. S.) C. P. 261.

[MAULE, J. That case did not decide that there may not be a title, which might be a title for two things, but is suited by a specification for one.]

¹ Not yet reported.

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That is not so here. The title, to which the disclaimer does not apply, is too large for the specification as altered by the disclaimer, and this invalidates the patent. *Morgan v. Seward*, Webst. Pat. Cases, 168. But in point of fact the disclaimer cannot operate from a time antecedent to its enrolment. Sect. 1, of 5 & 6 Will. 4, c. 83, enacts, indeed, "that such disclaimer, being filed and enrolled with the specification, shall be deemed and taken to be part of such letters patent or such specification in all Courts whatever." But the true meaning of those words is, that it shall be deemed and taken to be part from the time of such enrolment. That was the construction put upon them in *Perry v. Skinner*, 2 Mee. & W. 471; s. c. 1 Jur. 433; 6 Law J. Rep. (N. S.) Exch. 124, and confirmed in *Stocker v. Warner*, 1 Com. B. Rep. 148; s. c. 14 Law J. Rep. (N. S.) C. P. 90, especially in the judgment of Cresswell, J., who agreed in the suggestion of Parke, B., in *Perry v. Skinner*, that the words were to be read as if the words "from thenceforth" had been inserted, so as to avoid a construction which would have made a party who had infringed before enrolment a wrong-doer by relation.

[JERVIS, C. J. If those words were inserted, the proviso "that no such disclaimer shall be receivable in evidence in any action or suit pending at the time when such disclaimer was enrolled," would be useless.]

[MAULE, J. What is the condition of the bond which the prosecutor has to enter into?]

To give security for costs, if the patent is not cancelled.

[MAULE, J. You do not contend that it can be cancelled?]

No. But we say it is a hardship upon us to be liable upon the bond, by reason of the enrolment subsequent to issue joined.

M. Smith, (*Byles, Serj.*, with him,) in support of the rule. The words of the statute are quite clear, and make the disclaimer part of the specification for all purposes. The construction in the Court of Exchequer, in *Perry v. Skinner*, renders the proviso in sect. 1, regarding pending actions, quite useless. But that case, even if correctly decided, is only an authority where the other construction would make a party a wrong-doer by relation, in an action for infringement; it does not apply to a *sci. fa.* In *Stocker v. Warner*, the Court seem plainly to indicate that the doctrine in *Perry v. Skinner* is not to be extended. Then was this disclaimer receivable in evidence upon the issues joined? It was receivable upon them all. The pleas traverse all the suggestions of the declaration. In order to prove those issues, the prosecutor must put in the letters patent and specifications, and by sect. 1, of 5 & 6 Will. 4, c. 83, he is bound to put in the disclaimer as part of the specification. "It shall be deemed and taken to be part of such letters patent or specification in all Courts whatever." As to the objection that this disclaimer, if admissible, ought to have been pleaded *puis darrein*, that cannot be so. The only effect of that would be that the defendant would withdraw all his pleas, set out the disclaimer, and plead them all again in exactly the same way as before. The declaration does not point out *what* part of the invention

is not new, &c. The objections are not part of the record, but in the nature of particulars. They could not be noticed in a court of error, and by sect. 5 they may be added to by leave of a Judge. This answers the observation that the issues must be tried as joined, and that the objections form part of those issues. There is no hardship in giving the disclaimer the healing effect contended for by the defendant. The whole proceeding is an open one, and it is carefully provided by the statute that it shall only take place where right and justice will be promoted by it. As to the bond given by the prosecutor, no doubt if these issues are entered for the defendant it is forfeited; but then the enforcement of the bond is subject to the control of the Master of the Rolls or the Attorney General, who will exercise a proper discretion upon it.

[MAULE, J. Possibly that would be to make the prosecutor pay all costs subsequent to the disclaimer.]

Lastly, the title of the patent is not too large for the inventions specified, when those disclaimed have been struck out. The title is "for improvements in instruments used for writing and marking, and in the construction of inkstands." The first five parts which remain contain improvements in instruments used for marking as well as writing, and the last three are for "improvements in the construction of inkstands."

JERVIS, C. J. I am of opinion that this rule should be made absolute. Two principal questions arise in the case: first, what is the proper construction to be put upon the stat. 5 & 6 Will. 4, c. 83, s. 1; and secondly, whether the disclaimer which amends the specification is admissible upon these pleadings, and if so, what is its effect? If it had not been for the case of *Perry v. Skinner*, I confess I should have thought, upon reading the act of Parliament, that it was plain that the intention of the legislature was to allow a specification to be amended at any time by a disclaimer subsequently enrolled, and to provide that such disclaimer, having been perfected after proper precautions taken by the law officers of the Crown, and after such terms have been imposed as they in their discretion shall have thought fit, is to be deemed and taken to be a part of the original specification in all Courts whatever, except in actions pending at the time of its enrolment. Unless that be the real meaning of the act, it seems to me that the proviso, which says, "that no such disclaimer shall be receivable in evidence in any action or suit, (save and except in any proceeding by *sci. fa.*) pending at the time when such disclaimer was enrolled," is totally inoperative; for, if the construction in *Perry v. Skinner* is to be held to be the proper construction of the previous words, then, inasmuch as the disclaimer is to be deemed and taken to be part of the letters patent or specification only "from thenceforth," that is, from the date of the enrolment, the proviso would be useless which says that it shall not be receivable in the case of an action pending at the time of enrolment. I think, therefore, that this disclaimer must be read as part of the specification at the time when the patent was granted. The case, therefore, stands thus: The defendant

has a patent for inventions of three kinds, and on these eleven claims are founded; but some of these claims turn out not to be new in themselves, upon which the defendant disclaims some of them; and on reading the disclaimer as part of the specification, it will appear that no claim is made in respect of those parts, but only in respect of the remaining parts of the patent. But it is said, if this is so, and the disclaimer is to be read as part of the patent, it is void, because the patent is for three sorts of inventions, and the specification only for two; so that the patentee has not complied with the conditions of his patent, in not properly specifying the nature of his inventions, and has obtained a monopoly of three things when he has only described two. It may be doubtful, however, whether in truth the disclaimer, when properly read, is a disclaimer of the specification only. In reading the disclaimer, it adverts to an infirmity which may apply to the title as well as to the specification, and proceeds, "I disclaim those parts of my invention described in the specification as being the fifth, sixth, seventh, and eighth parts of the said invention." That may possibly be a disclaimer of the title as far as it is applicable to those parts. But whether the disclaimer applies to the title or not, it is clear that the specification, as amended by the disclaimer, complies with the title. The title is, "for improvements in instruments used for writing and marking, and in the construction of inkstands." And the specification, as amended by the disclaimer, describes improvements in instruments used in writing, by pens and pencils, in instruments used in marking by pens and pencils, and in the construction of inkstands. It is said the marking to be done is not done by pens and pencils, and the defendant does not show by his specification what the instruments for marking are. But if I am right in my view of it, there are certain things described in the specification, some of which are new, and some, being old, are disclaimed; the disclaimer points out those which it disclaims, and those which remain satisfy the title of the patent, and that is sufficient. If, then, the patent may be read in this way, the only question is as to the admissibility of the disclaimer upon these pleadings. If the objections filed by the prosecutor are part and parcel of the record, the separate issues raised by the objections must be tried, and decided upon the specification as it existed at first. But it is a mistake to say that the objections are a part of the record. They are more like the particulars of the plaintiff's demand, for the purpose of giving the defendant notice what he has to meet at the trial. Then what are the issues? The *sci. fa.* sets out the patent, but not the specification. If the defendant pleaded *non concessit*, he would be defeated. But upon these pleadings the plaintiff is obliged to put in the specification to show what is meant by his suggestions. Then supposing him to read a part of the specification, and to say to the defendant, "You claim this as new," the defendant has a right here to say, "No; read on, and you will see that I described that as old, and gave it up by my disclaimer." And so, in this case, it turns out to be untrue to say that any part of the invention is not new, and the defendant succeeds upon that issue. So of the rest. On these grounds I think we are bound to say that this

rule should be made absolute. I regret that I am even indirectly obliged to question the decision in *Perry v. Skinner*, which, however, I think inapplicable in this case.

MAULE, J. I also think that this rule ought to be made absolute. There are three questions raised in this case. The first arises on the construction of the statute; the second is, whether the disclaimer, supposing it to be receivable in evidence as part of the specification, though enrolled subsequently to issue joined, was admissible upon these issues; and the third, whether the specification, as amended by the disclaimer, is a specification sufficiently describing the invention according to the title of the patent. With respect to the construction of the statute, the words seem to me to be very clear, and so they were considered in *Perry v. Skinner*, except for a supposed inconvenience, which, it was said, would result from giving them their natural interpretation. The Court of Exchequer there thought that, but for such inconvenience, the construction would have been that which we put upon the statute. But I think, when the language of the statute is carefully considered, that the inconvenience which that Court apprehended from this construction will not arise. The act gives, not an absolute power to any one to enter a disclaimer, but only a power to apply to the discretion of the Attorney or Solicitor General, who may grant or refuse leave to enter such disclaimer, as he, acting judicially on behalf of the public, shall deem best for the public interest. That must be taken to be a provision made by the legislature for the prevention of inconvenience, as regards the public; power being given to the Attorney or Solicitor General to refuse, or only to grant provisionally, leave to the patentee to disclaim. Then, such leave being given, the statute adds a further limitation as far as individual rights are concerned, viz., "that any person may enter a caveat in like manner as caveats are now used to be entered against such disclaimer; which caveat, being so entered, shall give the party entering the same a right to have notice of the application being heard by the Attorney or Solicitor General." It does not say that the disclaimer, being entered, shall be a part of the specification, but only that, when allowed by the Attorney or Solicitor General and enrolled, it shall be deemed and taken to be part of it. This being so, I think we are bound by the act of Parliament to deem and take the disclaimer to be part of the specification, as from the date of the specification, although it was enrolled at a subsequent time. And that this is the true construction of the statute, appears by the words which follow: "That no such disclaimer shall be receivable in evidence in any action or suit pending at the time when such disclaimer was enrolled; but in every such action or suit the original title and specification alone shall be given in evidence, and deemed and taken to be the title and specification of the invention for which the letters patent have been or shall have been granted." Now, if there were any doubt as to the construction of the former words, I think these clear it up; for they show manifestly that with respect to the alternative not provided for, viz., when the disclaimer is *not* pending an

action or suit, then that shall happen which, but for the proviso, would have happened with respect to pending suits. And in this view the proviso was necessary in the case to which it applies; for, but for this proviso, not the original title and specification, but the amended title and specification would in such unprovided case have to be deemed and taken to be the title and specification of the invention for which the letters patent had been granted. Then if this be the literal sense of the section, let us consider whether we are bound in this case to put a different construction upon it on the ground of inconvenience. In the case of a *sci. fa.*, a person takes upon himself the part of a public prosecutor, and proceeds as such to question the validity of a patent. Now, the patent impugned may be one for some meritorious invention, as to the legality of some part of which difficulties might arise, upon the strict construction of the provisions of the laws relating to patents. It was to meet such a case as this, and to protect the patentee from having such a patent as this altogether rendered useless to him, that the statute of 5 & 6 Will. 4, c. 83, was passed. When, therefore, a person comes forward on behalf of the public, and brings a *sci. fa.* to repeal a patent; supposing the patent is for some useful invention such as this is admitted to be, but which, besides claiming some things really new and useful, also claims some by mistake, which turn out to have been discovered before; that would be a case within the object of the act, and such a patentee would be a fit person to be protected. The prosecutor here does not affect to say that the patent ought to be cancelled, and were it not for the bond given to secure the costs, it seems he would have all he requires. As soon as the disclaimer took place, every thing has been done which he ought to desire for the benefit of the public. He has *confitemur*, and whether the patent be cancelled, or altered so as to become a good patent, matters not. In this case the public, instead of a bad patent, which is a bad thing, have a good patent, which is a good thing. Therefore the prosecutor has all that he ought to wish for, except as regards the question of the bond for costs. Now, it appears that this bond is a matter upon which the Master of the Rolls or the Attorney General will exercise a discretion, and we must assume that they will exercise it properly. I confess I do not see either in the case of a *sci. fa.* or in the case of an action, that that injustice would arise which has been suggested by the Court of Exchequer in *Perry v. Skinner*. The principle of the enactment seems to me to be this: where there is a patent which the Attorney General considers to present a proper case for the exercise of his discretion in allowing a disclaimer, the act says, such patent shall not be avoided, but may be amended in the manner there provided. Great care ought to be, and no doubt is taken, that no injustice be done to individuals by such amendment. The spirit of the act may be stated thus: Whereas, there were previously many small and trifling objections, by which, if they were sustained against any one out of many important inventions, the whole was avoided, in such cases amendments may now be made by means of a disclaimer. Then, but for the proviso, a hardship might arise, if, a plaintiff having brought an action for

infringement, and the defendant having pleaded a defence good at the time, the plaintiff were to be allowed to destroy that good defence by enrolling a disclaimer. That case, therefore, is provided for. But in the case of *sci. fa.*, the proviso not applying, the general spirit of the act prevails, and where a disclaimer has been allowed by a proper authority, and has been enrolled by the patentee, he is allowed to take advantage of it. In *sci. fa.* the patentee is passive. The prosecutor wishes to have the patent cancelled if it ought to be cancelled, or amended if that is sufficient; and this is a good reason for making the exception in the proviso. Then, as to the costs, the law sometimes does not take that care of them which the parties and their advisers generally do; but in the present case the costs are not part of the judgment. If they are to be got at all, it is only by a proceeding which may be regulated according to the justice of the case. Upon the remaining questions: first, as to the admissibility of the disclaimer upon the issues joined, I think it is quite clear that upon the issues of novelty and utility it was necessary and proper to put in the disclaimer as part of the specification, and also upon the issue as to the proper description of the invention in the specification; and, lastly, as to the title of the patent: looking at it, and comparing it with the specification and disclaimer, I think we can see that it is correct.

WILLIAMS, J. The statute bids us, in plain and unambiguous language, to deem and take this disclaimer to be part of the specification; and unless we refuse to comply with that order of the legislature, I think we cannot refuse to admit the disclaimer in evidence as a part of the specification. What, then, is the effect of taking the disclaimer in evidence as part of the specification? It is to show that the specification, of which the disclaimer is a part, claims nothing the novelty or utility of which is disputed. It is said that we shall be doing injustice by this construction, and that it will be a hardship on the prosecutor to be liable on the bond; but it is admitted that the patent cannot now be cancelled. Therefore the prosecutor, as soon as he had his attention called to the disclaimer, had notice that all further proceedings would be useless. He should then have given notice that he discontinued all further proceedings, in which case I have little doubt the bond would not have been put in suit.

TALFOURD, J. I do not see how this disclaimer could have been pleaded *puis darrein continuance*; or how it could have been used otherwise than it has been used. I think that it was receivable in evidence; and, being receivable, that it proved the issues joined, for the defendant. — *Rule absolute.*

Hitchings v. Kilkenny, &c. Railway Company.

In re EMERY, HITCHINGS v. KILKENNY, &c. RAILWAY COMPANY.¹

November 21, 1850.

*Company—Execution against Shareholder—8 & 9 Vict. c. 16, s. 36—
Sci. Fa.—Suggestion—Execution under 7 Geo. 4, c. 46, s. 13.*

Under sect. 36 of 8 & 9 Vict. c. 16, the Court will not order execution to issue against a shareholder of a company without a *sci. fa.*, but will only, upon sufficient ground being shown, allow a *sci. fa.* to issue, in order that execution may be obtained against such shareholder to the extent pointed out by that section. A suggestion is not the proper course.

It is not sufficient, in order to obtain leave for issuing such *sci. fa.*, to show that *fi. fas.* have been issued against the effects of the company into two counties, and *nulla bona* returned to them.

The case of *Bartlett v. Pentland*, 1 B. & Ad. 704, in part overruled.

In this case a rule had been obtained by *Unthank*, calling upon George Emery to show cause why execution should not be issued against him, under the 8 & 9 Vict. c. 16, s. 36, as a shareholder in the Kilkenny, &c. Railway Company. The affidavits stated that two writs of *fi. fa.* had been issued against the effects of the company, one into Middlesex, and one into Surrey, and both returned *nulla bona*.

Slade now showed cause. The plaintiff has misapprehended the proper course of proceeding under the 8 & 9 Vict. c. 16, s. 36.² The only mode of fixing the defendant is by *sci. fa.* That was held to be the course under the 7 Geo. 4, c. 46, s. 13, the words of which section are the same in substance as those of the 8 & 9 Vict. c. 16, s. 36. *Cross v. Lawe*, 6 Mee. & W. 217; s. c. 9 Law J. Rep. (N. S.) Exch. 193.

[MAULE, J., referred to *Bartlett v. Pentland*, 1 B. & Ad. 704; s. c. 9 Law J. Rep. K. B. 109.]

In that case it was held, that the facts must be suggested upon the record. This is an attempt to charge a person in execution who is not a party on the record.

[MAULE, J. The principle of those decisions is, that the party should have some opportunity for having the matter tried by a jury, and bringing a writ of error, if necessary.]

And, though the acts say that execution shall issue, they mean after the proper stages have been taken to make the person intended to be charged a party to the record.

[WILLIAMS, J., referred to *Clowes v. Brettell*, 11 Mee. & W. 461;

¹ 20 Law J. Rep. (N. S.) C. P. 31.

² That section enacts: "If any execution either at law or in equity shall have been issued against the property or effects of the company, and if there cannot be found sufficient whereon to levy such execution, then such execution may be issued against any of the shareholders to the extent of their shares respectively in the capital of the company not then paid up: Provided always, that no such execution shall issue against any shareholder except upon an order of the Court in which the action, suit, or other proceeding shall have been brought or instituted, made upon motion in open Court after sufficient notice in writing to the persons sought to be charged; and upon such motion such Court may order execution to issue accordingly."

s. c. 12 Law J. Rep. (N. S.) Exch. 302, and JERVIS, C. J., to *Whittenbury v. Law*, 8 Sc. 661; s. c. 4 Jur. 485.]

Those cases, and *Bosanquet v. Ransford*, 11 Ad. & E. 520; s. c. 9 Law J. Rep. (N. S.) Q. B. 44, show that a *sci. fa.* is necessary.

The Court then called on

Unthank, in support of the rule. It is not disputed that a *sci. fa.* is necessary under sect. 13 of 7 Geo. 4, c. 46. But the words of that section are different from those of the section under which this application is made, and which provide more carefully for the protection of parties sought to be charged. Sect. 68 of 7 & 8 Vict. c. 110, shows that the legislature will, in some cases, fix parties who are not on the record. The words in that clause are, "without any suggestion or *scire facias*." That clause was acted upon in *Peart v. The Universal Salvage Company*, 6 Com. B. Rep. 478; s. c. 18 Law J. Rep. (N. S.) C. P. 23.

[MAULE, J. You seek here to make the defendant liable without the benefit of a trial by jury, on affidavit alone.]

No doubt; but the Court may direct an issue, if there is any difficulty.

[MAULE, J. They may. But he has a right to have the opinion of a court of error upon the record. There may be a good reason for making it necessary to ask the Court for leave to issue a *sci. fa.* Execution is only to be issued against a shareholder, if it has been fruitless against the company. That may be a proper matter for the Court to judge of; and if that fail to be shown, there would be good ground for refusing leave to issue a *sci. fa.* in order to give execution against a shareholder.]

The words of the act are relied upon, "such Court may order execution to issue."

[JERVIS, C. J. That is, the Court may order the proper machinery to be put in motion.]

[WILLIAMS, J., referred to *Wingfield v. Barton*, 2 Dowl. P. C. (N. S.) 355.]

The Court will mould the rule, and make it absolute for a *sci. fa.* to issue.

[MAULE, J. You have not sufficiently shown that you cannot get sufficient execution against the company.]

Two *fi. fas.* have been issued, one into Middlesex, and one into Surrey, and *nulla bona* returned to both.

[JERVIS, C. J. That is not enough.]

Per Curiam. The rule must be discharged. A *sci. fa.* is necessary. In *Bartlett v. Pentland*, it was held, that, under the 7 Geo. 4, c. 46, a *sci. fa.* or suggestion was required. We think that a suggestion will not do; and that *Bartlett v. Pentland* has, to that extent, been overruled. — *Rule discharged.*

Abley v. Dale.

ABLEY v. DALE.¹

November 11, 1850.

County Court — Order for Payment or Committal under 9 & 10 Vict. c. 95, ss. 98, 99, Validity of.

An order on a judgment summons under the 98th and 99th sections of the 9 & 10 Vict. c. 95, by which the judge of a county Court ordered a party to pay a debt (previously recovered) by instalments, or on default to be committed to prison, is bad; because the party is entitled to a summons to show cause against the committal — confirming *Ex parte Kinning*, 4 Com. B. Rep. 507; s. c. 16 Law. J. Rep. (N. S.) Q. B. 257.

TRESPASS for false imprisonment. The declaration stated, that the defendant, on the 20th of August, A. D. 1849, with force and arms, assaulted the plaintiff, and seized him, and caused him to be arrested and apprehended, and unlawfully committed to a certain common jail or prison, called the House of Correction for the county of Middlesex, and also there imprisoned the plaintiff, and kept and detained him in prison there, without any reasonable or probable cause, for a long space of time, to wit, for the space of twenty days then next following, contrary to law, &c., whereby, &c.

Plea. That before the said time when, &c., in the declaration mentioned, to wit, on the 1st of June, A. D. 1847, the now defendant and one George Cornelius Dale, according to the form of the statute in that behalf, levied their plaint in the Whitechapel County Court of Middlesex, against the now plaintiff, for the recovery of a certain debt, to wit, 13*l.* 3*s.*, then and within the jurisdiction of the said court, justly due and owing from the now plaintiff to the now defendant, and the said G. C. Dale, which said court, then and thence continually, during the times hereinafter in this plea mentioned, was holden within the district of the said court, before James Manning, one of her Majesty's serjeants-at-law, then, and during all that time, being the judge of said court, which said court then, and during all that time, had jurisdiction, to hear and determine the said plaint, and the now plaintiff, who was then liable to be sued in the said court, for the said debt, was then, to wit, on the day and year last aforesaid, duly summoned to answer the said plaint. And further, that the now plaintiff afterwards and before the said time, when, &c., to wit, on the 10th of June, in the year last aforesaid, appeared in the said court so holden as aforesaid, to answer the said plaint; and such proceedings were thereupon had in the said plaint, that afterwards and before the said time when, &c., to wit, on the day and year last aforesaid, the now defendant and the said G. C. Dale, by the consideration and judgment of the said court, recovered against the now plaintiff, as well the said debt, amounting to the said sum of 13*l.* 3*s.*, as also the sum of 2*l.* 7*s.*, for the costs and charges of the now defendant and the said G. C. Dale, by them about their suit, in that behalf expended, by the said court, then adjudged to them, in that behalf, which said two several sums of 13*l.* 3*s.* and 2*l.* 7*s.*, amounting in the whole to a large sum, to wit, the sum of 15*l.* 10*s.*, were then ordered, by the said court, in due man-

¹ 20 Law J. Rep. (N. S.) C. P. 33. 14 Jur. 1069.

ner, according to the statute in that behalf, to be paid by the now plaintiff to the now defendant and the said G. C. Dale, by certain monthly instalments, that is to say, by instalments of 15s. every month, the first of such instalments to be paid on the 10th of July, then next; such payments to be made at the office of the clerk of the said court, as by the record of the proceedings in the said plaint, still remaining in the said court, more fully appears. . And further, that the now plaintiff, on divers days, afterwards and before the issuing of the summons hereinafter mentioned, paid divers small sums of money, amounting in the whole to the sum of 2l. 7s. 4d., and no more, for and towards payment of the said instalments; but that, the now plaintiff, made default in payment of the residue of the said instalments, although, at the time of the issuing of the said summons, hereinafter mentioned, the whole of the said instalments had become due and payable, and that 12l. 12s. 8d., parcel of the said sum of 15l. 10s., at the time of the issuing of the said summons, hereinafter mentioned, and of the making of the order and of the committal, hereinafter also mentioned, remained and was wholly due and unpaid and unsatisfied to the now defendant and the said G. C. Dale.

And further, that the said sum of 12l. 12s. 8d. so remaining due and unpaid, and the said judgment being and remaining unsatisfied, afterwards and before the said time when, &c., to wit, on the 20th of May, 1849, the now defendant and the said G. C. Dale, according to the course of practice and rules of the said Court, and the form of the said statute, caused the now plaintiff to be summoned, and the now plaintiff then was summoned to appear at the said County Court, to wit, at the Court House in Osborne Street, Whitechapel, on the 31st of May, A. D. 1849, to answer such questions as should be put to him touching his, the plaintiff's, estate and effects, and the manner and circumstances under which he, the now plaintiff, contracted the said debt which was the subject of the suit in which the said judgment was so obtained as aforesaid, and as to the means and expectations which the now plaintiff had at the time he contracted the said debt, and as to the property and means he then still had of discharging the said debt, and as to the disposal he might have made of any property; and the now defendant avers that the said several things touching which the now plaintiff was so summoned to answer such questions as should be put to him were named in the said summons, and that the said summons, to wit, on the said 20th of May in the year last aforesaid, was in due manner served upon the now plaintiff personally, he the now plaintiff then dwelling within the limits of the said Court. And further, that afterwards and before the said time when, &c., to wit, on the said 31st of May, A. D. 1849, at the said County Court, before the said Judge, the now plaintiff appeared in answer to the said summons, pursuant to the exigency thereof, and was then examined touching his estate and effects, and the manner and circumstances under which he contracted the said debt, and as to his means and expectations which he had at the time of the contracting of the said debt, and as to the property and means he then still had of defraying the said debt, and as to the disposal he might have made of any property; and thereupon it then appeared

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to the satisfaction of the said Judge of the said Court, and it was then adjudged by the said Court upon the said examination, that the now plaintiff had sufficient means and ability of discharging the said sum of 12*l.* 12*s.* 8*d.* when the same became due under the said order, and that he still had sufficient means and ability of discharging the same. And it was thereupon then at the said Court adjudged and ordered by the said Court, that the now plaintiff should pay the said sum of 12*l.* 12*s.* 8*d.*, together with 1*l.* 13*s.* 8*d.* for the costs of the last-mentioned summons and the proceedings thereon, according to the statute in that behalf, amounting in the whole to the sum of 14*l.* 6*s.* 4*d.* by instalments of 10*s.* in every month, the first instalment to be paid on the 2d of July then next, or that the now plaintiff be committed for the term of twenty days to the House of Correction for the county of Middlesex, in Coldbath Fields, in the said county, according to the form of the statute in such cases made and provided, or until he should be discharged by due course of law, as by the last-mentioned order remaining in the said Court, reference being thereto had, will fully appear. And further, that afterwards and before the said time when, &c., in the declaration mentioned, to wit, on the 2d of August in the year last aforesaid, two of the last-mentioned instalments became due and in arrear, but the now plaintiff wholly neglected and refused to pay the same or any part thereof, whereupon the said sum of 14*l.* 6*s.* 4*d.* and every part thereof still remained wholly due and unpaid. That afterwards and before the said time when, &c., to wit, on the 17th of August, in the year aforesaid, the now defendant and the said G. C. Dale caused to be sued and prosecuted out of the said County Court, then holden before the said Judge, within the district for the said Court, and there was then in due form of law issued by the said Court, according to the form of the statute in such case made and provided, a certain warrant in writing, under the seal of the said Court, and bearing date the day and year last aforesaid, and directed to the high bailiffs and other bailiffs of the said Court, and all constables and peace officers within the jurisdiction of the said Court, and to the governor of the House of Correction aforesaid, whereby, after reciting the premises hereinbefore mentioned, the said high bailiffs, bailiffs, and constables and peace officers were required to take the now plaintiff, and to deliver him to the governor of the said House of Correction, and the said governor was thereby required to receive the now plaintiff, and him safely keep in the said House of Correction for the term of twenty days from the arrest under that warrant, or until he should be sooner discharged by due course of law; which said warrant afterwards, and before the said time when, &c., to wit, on the day and year last aforesaid, was delivered to Nathaniel Sykes, then being one of the bailiffs of the said Court, to be executed in due form of law, by virtue of which said warrant he, the said Nathaniel Sykes, so being such bailiff as aforesaid, afterwards, to wit, on the 20th of August, in the year last aforesaid, within the jurisdiction of the said Court, in execution of the said warrant, gently laid his hand upon the now plaintiff, in order to arrest him for the cause aforesaid, and did then

and there arrest him for the cause aforesaid, and did then and there deliver him to the said governor of the said House of Correction, who did then keep and detain the now plaintiff in custody under the said warrant, for the space of twenty days from the said arrest, which are the same alleged trespasses whereof the plaintiff hath above complained against the defendant. Verification.

Special demurrer. The chief ground was, that the commitment on the order to pay the residue of the debt by instalments, as alleged in the plea, was bad, inasmuch as the original judgment having been varied the plaintiff ought to have been summoned again touching his neglect to comply with the second order, and because he had no opportunity, before the committal, of proving that he had paid the instalments, or showing an excuse or release.

Lush, (November 11,) in support of the demurrer. The objection to the plea is, that the Judge of the County Court could not commit the present plaintiff without issuing a summons, calling upon him to show cause why he should not be committed. There is no substantial distinction between the present case and that of *Ex parte Kinning*, 4 Com. B. Rep. 507; s. c. 16 Law J. Rep. (N. S.) Q. B. 257. In that case there was an order to pay the debt by instalments, and then, on default in the payments, the Judge ordered the defendant to be committed. Here, there was an order on a judgment summons for the then defendant to pay by instalments, or to be committed for twenty days. The doctrine laid down by the Court of Common Pleas in *Ex parte Kinning*, was afterwards upheld in *Kinning v. Buchanan*, 18 Law J. Rep. (N. S.) C. P. 332, and the principle established by both those cases is distinctly applicable to the present, it being therein held, that the Judge could not commit the party without giving him an opportunity of showing cause upon summons. If an order like that stated in the plea is good, whose duty will it be to determine whether there had been any payment or not? The plea does not show that the Judge of the Court had any thing whatever to do with the issuing of the warrant under which the defendant seeks to justify the trespass.

[MAULE, J. The substantial objection is, that a man shall not be punished without being heard, as was established by *Dr. Bentley's Case*, 1 Str. 557; s. c. 2 Ld. Raym. 1334.]

Hugh Hill, contra. The question is really one of substance, and not of form. The case of *Ex parte Kinning* is clearly distinguishable from the present, and is no authority for saying that the judgment here should be for the plaintiff. In that case, the party appeared but once before the Court, and was then ordered to pay certain moneys by instalments, and on default being made, the Judge, without any further appearance or summons, ordered him to be committed. In this case the now plaintiff (the defendant in the County Court) was summoned to appear at the Court, and having appeared, was ordered to pay the debt by instalments. Default having been made in the payment, the plaintiff in the County Court took out a judgment

summons against the defendant, pursuant to the 98th section of the 9 & 10 Vict. c. 95, and the Judge made an order for payment or for committal under the 99th section.

[MAULE, J. Is not the party in the same position with an order on a summons under the 98th section, as with an original order?]

The statute contains no provision giving the Judge power to bring a defendant before him in order to inquire into a fact, except in the case of a judgment summons under the 98th section. In the County Courts, money ordered to be paid is not paid to the party, but to the clerk of the Court; so that the Court must be taken to have judicial notice of a default.

[MAULE, J. But the question is, whether you must not give the party notice, so that he may come before the Judge, and show cause if he can. Does the statute not mean that if a party has not paid, the Judge may order him to pay, or if he has not paid, the Judge may order him to be committed? As I understand it, the Judge cannot say "You shall pay in six weeks; and if you do not, you shall stand committed." The ground of the judgment of this Court in *Ex parte Kinning* was, that if the party had got a summons, the Judge might have seen circumstances in the case which would have induced him not to commit. The judgment there was, that the legislature had inserted nothing in the statute to take away the general right of parties not to be imprisoned or censured without notice.]

Surely, the defendant in this case cannot be a trespasser, since he recovered judgment, took out a judgment summons, had an adjudication of the defendant's ability to pay, an order that he should pay, or in default be committed, and default being made, he got a warrant from the clerk of the Court. The Judge in his order may mean to say, "I might commit you now, but I shall give you an opportunity of paying; and if you do not pay, you will stand committed." If the Court has been guilty of an excess of jurisdiction, will that make the party acting under its authority a trespasser?

[JERVIS, C. J. Such was the decision in the case of *Kinning v. Buchanan*.]

In the case *In re The Hammersmith Rent Charge*, 19 Law J. Rep. (N. S.) Exch. 357, it was held, that an order may be made *ex parte* by a Judge, if it appear that such was the intention of the legislature.

[MAULE, J. That was a case of civil process. Here a discretionary power of punishment is given to the Judge. The principle of the law is that a Court, in awarding a punishment, should have all the circumstances of the case before it. A Court of Error cannot assess a punishment. Here, the punishment is imprisonment for a period not exceeding forty days. Can the Judge determine that any breach of his order shall be punished by a certain imprisonment? Supposing a party had paid all but the last sixpence of the last instalment, and was taken ill and prevented from paying that residue, he would be liable under an order like that mentioned in the plea to be imprisoned for the whole term.]

It is submitted that nothing can excuse a party against whom such an order is made, except the payment of the whole of the instalments. The practice is, to make an order for the committal of the party, which is left in the office of the County Court, and issued if the instalments be not paid.

[JERVIS, C. J. There is no reason why the party should not be taken before the Judge again, under sect. 98, because the judgment is unsatisfied.]

The statute does not seem to contemplate any further summons as necessary.

JERVIS, C. J. It seems to me, that in this case we are bound by the authority of *Ex parte Kinning*. That case is not quite the same as the present; but it proceeds on the broad general principle of natural justice, that a party should not be punished without being heard. If the language of the statute were contrary to that principle, no doubt the right might be taken away. But I see nothing in the statute which can have that effect. Under the 98th and 99th sections, the Judge has power to commit in seven different cases. The seventh is, where the party summoned has sufficient means and ability to pay the debt recovered against him, either altogether or by any instalments which the Court shall have ordered, and if he shall refuse, or neglect to pay the same, as shall have been so ordered—if the party appears before the Court, and refuses to pay, thereupon the Judge's power to commit attaches. That is consistent with the general rule of law, and there is no necessity for straining the words of the section, so as to give any further power. Things might have occurred which would have made it impossible for the party to pay according to the order in this case. I am, therefore, of opinion, that the judgment ought to be for the plaintiff.

MAULE, J. I agree with my Lord Chief Justice; and it is not necessary for me to go into the grounds of my opinion, as they are substantially the same, especially as I asked some questions during the argument, which would have received an answer if any answer could be given. This case is under the 98th and 99th sections of the 9 & 10 Vict. c. 95; but my decision proceeds on the general ground that a man is not to be punished without being heard. That is a principle of justice both divine and human, as is said by one of the Judges in *Dr. Bentley's Case*.

WILLIAMS, J. Although I did not take part in the decision of the case *Ex parte Kinning*, I entirely concur in that case and the principle laid down by the Judges in it. I think that, without abandoning that principle, we could not hold the order in this case to be good.

TALFOURD, J. When a Judge makes an order applicable to a future time, and thinks that money should not be ordered to be paid forthwith, his order must be liable to all the contingencies in human affairs which may happen before the time appointed. I therefore think the judgment ought to be for the plaintiff.—*Judgment for the plaintiff.*

 Kepp & another v. Wiggett & others.

KEPP & another v. WIGGETT and others.¹

November 19, 1850.

Bond — Collector of Income-tax — 5 & 6 Vict. c. 35, and 8 & 9 Vict. c. 4 — Estoppel.

The defendants, as sureties for one J. L., executed, on the 6th October, 1846, a bond to the plaintiffs, who were Commissioners under the Income-tax Acts, by which bond, after reciting that J. L. had been duly appointed collector of the duties granted by those acts assessed within the parish of M., and that duplicates of the assessments had been delivered to J. L., with a warrant for collecting the same, the defendants became bound for the payment of all such sums assessed and collected for the year ending April, 1847, or to be assessed and collected in such parish by J. L. as such collector as aforesaid. A duplicate of the assessment of duties under schedule (A) of stat. 5 & 6 Vict. c. 35, made on persons in M. for three years ending April, 1847, had been delivered to J. L. by the plaintiffs, together with a warrant for collecting the same; but no such duplicate of assessments under schedule (D,) nor warrant for collecting, had been delivered to J. L. On the 14th October, 1846, J. L. died, having received previously some of the duties under schedules (A) and (D) for the year ending April, 1847, for which he had given the usual receipt as collector:—

Held, that the defendants were not liable in respect of the duties received under schedule D, as, for want of the duplicate and warrant, J. L. had not at the time authority to receive the same.

Held, also, that the defendants were not estopped by the recital in the bond from denying that J. L. was authorized to collect such duties.

THIS was a writ of inquiry, after judgment upon demurrer, to assess the damages sustained by the plaintiffs by reason of certain breaches assigned on the condition of the bond set forth in the writ. The writ of inquiry recited the bond and condition, and pleadings, by which it appeared that the declaration was in debt on a bond, dated the 6th October, 1846, in the penal sum of 8000*l.*, given by the defendants, and one James Lee, deceased, to the plaintiffs. The defendants cravedoyer of the bond and condition, misreciting the same onoyer, and pleaded general performance. The plaintiffs then enrolled the bond and condition, and demurred specially to the plea; judgment on which was afterwards given by the Court in favor of the plaintiffs. The condition of the bond, as set out in the enrolment, was as follows: "And whereas the above-bounden James Lee hath been duly nominated and appointed a collector, for the year ending the 5th day of April, 1847, of the several duties granted by the said recited acts which have been or hereafter shall be assessed within the said wards and parish of St. Martin-in-the-Fields for the said last-mentioned year, under, or by virtue of, the said acts; and the said James Lee, together with the said James Wiggett, Richard Robinson, and George Robinson, as his sureties, have entered into and executed the above written obligation, to give good and sufficient security for the faithful discharge and due performance by the said James Lee of his said office of collector as aforesaid: and whereas duplicates of the assessments have been delivered and given in charge to the said James Lee, with a warrant or warrants for collecting the same: now, the condition of the above-

¹ 14 Jur. 1137. 20 Law J. Rep. (N. S.) C. P. 49.

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written obligation is such, that if the above-bounden James Lee, James Wiggett, Richard Robinson, and George Robinson, or either of them, or either of their heirs, executors, or administrators, shall and do duly, in pursuance of the directions of the said acts, pay all such sums of money which now are assessed and collected, for the year ending the 5th April, 1847, or which hereafter may be assessed and to be collected in the said wards and parish of St. Martin-in-the-Fields, by the said James Lee as such collector as aforesaid; and if the said James Lee shall and do duly, in pursuance of the said act, demand the sums assessed of the respective persons from whom the same are payable, and, in case of non-payment thereof, shall duly enforce the powers of the act against such as shall make default, then the above-written obligation to be void, otherwise the same shall be and remain in full force and virtue." The plaintiffs assigned for breaches the non-payment by Lee of various sums received by him as such collector, as aforesaid. The writ of inquiry issued to assess the damages sustained by reason of such breaches, which writ was executed before Wilde, C. J., at the Middlesex Sittings, after Hilary Term, 1849, when the jury assessed the damages at 513*l.* and costs, subject to be reduced to nominal damages, or such other sum as the Court should think the plaintiffs entitled to recover, according to the opinion of the Court on the following case: The plaintiffs are two of the commissioners of the property and income tax for the parish of St. Martin-in-the-Fields, Westminster, under the 5 & 6 Vict. c. 35, and 8 & 9 Vict. c. 4. The said James Lee, from the coming into operation of the said act of the 5 & 6 Vict. c. 35, acted as collector of the property and income tax for the said parish. The bond and condition set forth in the writ was executed on the 6th October, 1846, by Lee and the defendants. On the 22d October, 1845, a duplicate of the first assessments of the duties under the respective schedules (A) and (B) of the 5 & 6 Vict. c. 35, made upon the several persons chargeable with the said duties within the parish of St. Martin-in-the-Fields, for the year ending the 5th April, 1846, to remain in force for the space of three years, commencing from the 5th April, 1845, and ending on the 5th April, 1848, was delivered by the plaintiffs, acting as such commissioners as aforesaid, to the said Lee; and annexed to the said duplicate, and delivered at the same time by the said plaintiffs, acting as aforesaid, to the said Lee, was a document under the hands and seals of the plaintiffs, in the form provided by the Commissioners of Stamps and Taxes. The case then set out such document, which was the collector's appointment and warrant, and was directed to Lee and one Thomas Butlin, and which, after stating therein that the commissioners had appointed Lee and Butlin collectors of the duties contained in the said assessment, enjoined and required them, or either of them, to make demand of the several sums contained in the foregoing duplicate of assessment from the parties charged therewith, or at the places of their last abode, or on the premises charged with the assessment, as the case might require, within ten days after the duties should respectively become payable next after the delivery to them, Lee and Butlin, of the said duplicate of assessment, and upon payment thereof to give

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acquittances under their hands (without taking any thing for such acquittances) unto the several persons who should pay the same, with power to distrain in case of default. The above warrant and appointment remained unrevoked during the life of the said Lee, and no allusion was made in the said assessment, nor was any new rate or book delivered to the said Lee or to the said Butlin for the second or third year. Previous to the delivery to the said Lee of such warrant and appointment, he was required to give, and did give, security, as such collector of the said duties, by a bond, with sureties, in the penal sum of 8000*l.*, in precisely the same terms and form as the bond set forth in the said writ, and he had given a similar bond for each of the three previous years. The total amount of the assessment, under the schedules (A) and (B,) for the year ending the 5th April, 1847, was 2191*l.* 9*s.* 2*d.*, and the amount under schedules (D) and (E) was 4951*l.* 13*s.* 11*d.* The duties so assessed under schedules (A) and (B,) and (D) and (E,) were respectively due and payable at the same times, and the persons respectively assessed to, and chargeable with, both duties, were applied to for payment thereof at one and the same time by the said Lee. After the death of Lee, one Richard Thomas Pugh was appointed collector. The case then set out the deed of appointment of Pugh, which, after reciting the death of Lee on the 14th October, 1846, revoked the appointment of the said Lee as such collector as aforesaid, and appointed the above-named Pugh, in the place and stead of the said Lee, to be collector of the duties and sums of money remaining due, and in arrear, and uncollected on the duplicate of assessment therewith delivered to him, the said Pugh, for the said year ending on the 5th April, 1847. With the said appointment was delivered to the said Pugh the said duplicate of assessment, under schedules (A) and (B,) formerly delivered to Lee. On the 12th May, 1847, a return was made by the plaintiffs to the receiver general of the total amount of duties assessed under schedule (A,) and also the total amount of the duties assessed under schedules (D) and (E) respectively, for the year ending the 5th April, 1847, in pursuance of the directions of the said act of the 43 Geo. 3, c. 99, s. 46, in which said duplicate or return Butlin and Pugh were stated to be the collectors of the whole amount of the said duties respectively. The case set forth a minute made at a meeting of the Property and Income Tax Commissioners, held on the 12th August, 1846, ordering notice of assessment for the year ending the 5th April, 1847, to be delivered, and appointing Butlin and Lee collectors for the said year. The bond and condition mentioned and set forth in the writ was duly executed at the office of the said commissioners, by the said Lee and the said defendants, on the 6th October, 1846, as aforesaid. The certificates of the assessments were duly made out and entered, but the appeals were not then concluded, and no duplicate of assessment under schedule (D) for the year ending 5th April, 1847, nor any warrant for collection of any of the said duties under schedule (D) was delivered to the said Lee, but he retained possession of the aforesaid duplicate of assessment under schedule (A,) with the warrant hereinbefore set forth thereto annexed. After the said assessments were

made, a notice of assessment was given to each of the several persons so assessed, including the persons hereinafter named, from whom the said Lee received the moneys hereinafter stated, and no notice of appeal against such assessment was ever given, nor was any appeal made by either of the said last-mentioned persons so assessed. On the 14th October, 1846, the said Lee died. On the 25th November, 1846, a duplicate of the assessment, with a warrant to receive the sums assessed, was delivered to the said Pugh. The case then set out such duplicate and warrant, the latter being directed to Pugh and Butlin, and similar to the warrant directed to Lee and Butlin before mentioned. On the 20th September, 1846, before the receipt by the said Lee as hereinafter mentioned, the following sums were due and payable for two quarterly instalments of property-tax, or duties granted under schedule (A,) by the respective persons whose names are set opposite to the same respectively, in respect of the year ending the 5th April, 1847, in the parish of St. Martin-in-the-Fields:—

Under Schedule (A.)

Messrs. C., D., & Co.	. . . . .	£48 18 10
John W.	. . . . .	0 6 5
William W.	. . . . .	1 9 2
William H.	. . . . .	0 14 7
Thomas C.	. . . . .	0 15 6

On the 20th September, 1846, and before the receipt by the said Lee, as hereinafter mentioned, the following sums were due and payable for two quarterly instalments of property tax, or duties granted under schedule (D,) by the respective persons whose names are set opposite to the same respectively, in respect of the year ending the 5th April, 1847, in the parish of St. Martin-in-the-Fields:—

Under Schedule (D.)

Messrs. C., D., & Co.	. . . . .	£452 1 8
William B.	. . . . .	2 9 0
Thomas C.	. . . . .	2 18 4

All the above persons had been assessed to the property and income-tax for each of the three years preceding, and had duly paid the amounts of their assessments to the said Lee; and upon application to them by the said Lee, the said several sums above particularly mentioned were paid to him by the said parties respectively in respect of the said last-mentioned year; and the said Lee gave to the said parties respectively a printed receipt for the same, in the usual form, as collector of the said duties, and dated respectively on the respective days when such payments were made as hereafter stated—that is to say,—

1846.		<i>Sched. (A.)</i>	<i>Sched. (D.)</i>
Sept. 26.	Thomas C.	£0 15 6	£2 8 6
" 29.	William W.	1 9 2	
Oct. 2.	William H.	0 14 7	
" 5.	C., D., & Co.	48 18 10	452 1 8
" 7.	William B.		2 9 0
" 7.	Robert W.	0 6 5	

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None of the said monies so received by the said Lee as aforesaid have ever been paid, either by the said Lee or by the said defendants, or either of them, as his sureties, or by any other person on his or their behalf. The opinion of the Court was to be taken whether the verdict ought to be reduced, and by how much. It was to be taken as a fact, that the parties who paid Lee had, upon appeal, insisted upon those payments as a discharge, and refused to pay. The Court to be at liberty to draw such inferences of facts as the case warranted. The plaintiffs and defendants agreed, that, in the event of the verdict standing for more than nominal damages, it should be referred to a barrister, to find whether the defendants were entitled to any verdict in respect of the sums realized by the plaintiffs from the estate of Lee. The case was argued by

Channell, Serjt., (*Needham* with him,) for the plaintiffs, and by

Bytes, Serjt., (*Ogle* with him,) for the defendants.

The latter admitted that the defendants were liable in respect of the money received under schedule (A,) as for such Lee had received a duplicate of assessment; but it was contended that they were not liable as to the money received under schedule (D,) as for that Lee had not had the duplicate of assessment delivered to him.

On behalf of the plaintiffs, it was argued that the defendants were liable, as it was not necessary, in order to fix the defendants with liability, that such duplicates should be previously delivered; and the defendants were besides estopped by the recital in the bond from denying that Lee was a collector authorized to receive the moneys in question.

JERVIS, C. J. The defendants' counsel have properly admitted that the defendants are liable in respect of schedule (A,) and that the liability is coëxtensive with the receipts by Lee under that schedule. Indeed, it is plain, on referring to the provisions of the statute, that the assessment under schedule (A) is to remain in force for three years; and by the terms of the bond the defendants were to be liable in respect of assessments made before as well as after the bond. The result is, that the plaintiffs are entitled to the judgment of the Court as to the amount received under schedule (A,) but I think it must be confined to that amount. According to *Webb v. James*, 10 Law J. Rep. (N. S.) Exch. 89; s. c. 7 M. & W. 279, the collector must receive the moneys as such, and in pursuance of the act: it is important, therefore, to see if there is any estoppel to the defendants setting up that Lee was not authorized to receive the moneys assessed under schedule (D.) I am of opinion that there is no estoppel. At the time of the bond being given, it appears that Lee was nominated and appointed collector of the duties granted by the act, and the condition of the bond shows that it was contemplated that the bond was to be for the moneys not only then assessed, but which might thereafter be assessed and collected. It is plain that Lee was appointed, in fact, collector, and that the money was assessed; but then the question is, Was he authorized to collect

it as collector? I am of opinion that he was not. It appears by the act, that, pending the appeal, the assessment is not perfect. Until the duplicate of assessment has been given to the collector, he has no information what is due, nor any authority to collect the duties. For these reasons, I am of opinion that there should be judgment for the defendants, as to the moneys received under schedule (D.)

MAULE, J. I am of the same opinion. With respect to there being any estoppel, I think the true answer is, that the matters stated in the case, and which were within the knowledge of the parties to the bond, show, that in speaking of the appointment of Lee to be collector, it was not meant that he was a person fully armed with authority to receive the assessments. The question, then, is, whether Lee received the money in his capacity of collector. I consider it to be clear that a collector is not authorized to lawfully receive money so as to bind the Crown, until he has been empowered to do so, by the delivery to him of the warrant to collect; indeed, until then, he has no means of knowing the amount assessed which he has to collect. Under the 43 Geo. 3, c. 99, the commissioners of taxes are forthwith, after the certificates of assessments have been sent, to deliver the duplicates of the assessment, together with their warrants, to the collectors; but under the Income-tax Act, 5 & 6 Vict. c. 35, the machinery is different. Notice is to be given to the parties assessed, and it is not until after the day for hearing the appeals that the commissioners under the Income-tax Act are to issue to the collectors duplicates of the assessments. Comparing, therefore, the two acts in *pari materiâ*, it appears that under the one it was intended that there should be an immediate collection after the assessment; and under the other, the collection is not to be immediate, but is to be postponed until after the appeals have been determined. I, therefore, think that the true construction excludes the liability of the defendants for the moneys received under schedule (D.)

WILLIAMS, J. I also concur in the opinion of the Court. The sureties are only liable for the receipt of so much of the income-tax in respect of which their principal could have given a legal discharge. Now, with respect to the moneys under schedule (D,) the collector had received no duplicate of assessment, and had, therefore, no authority to give any discharge for what he received. The only question, then, is, whether the defendants are estopped by the recital in the bond from saying that the collector had not the duplicates and warrant to receive these moneys. Now, the rule of law is, that an estoppel, to be good, must be certain to every intent; but the recital here is not certain, for it is at least doubtful whether it refers to duplicates of assessment under schedule (A) or schedule (D.) I think, therefore, that there is no estoppel.

TALFOURD, J. I am of the same opinion. It appears that Lee was never appointed collector, and armed with authority to receive the sums under schedule (D.) — *Judgment for the plaintiffs. Verdict to be reduced to 52l. 4s. 6d., the amount collected under schedule (A.)*

Sarah Watson, Demandant, John Watson, Tenant.

SARAH WATSON, Demandant, JOHN WATSON, TENANT.¹

November 5, 1850.

Dower unde nihil habet — Plea of tout temps prist — Damages — Evidence of Demand.

On a plea of *tout temps prist* to a declaration in dower under the statute of Merton, replication of a demand and refusal to render dower before the writ sued out, rejoinder traversing the demand, and issue thereon found for the demandant, the demandant is entitled to damages from the death of her husband, and not from the date of the demand only.

Dower may be demanded by another person on behalf of the widow; and a demand in the presence of witnesses is not necessary.

DOWER, (under stat. Merton, 20 Hen. 3, c. 1,) for one third of certain premises, with the appurtenances, of the endowment of John Watson, deceased, heretofore husband of the demandant, whereof she hath nothing.

Plea, that from the death of the said John, late husband, &c., the tenant has always been and still is ready to render to the said Sarah Watson her dower of the said premises, with the appurtenances, and rendereth the same here in Court to the said Sarah Watson.

Replication, that the demandant ought not to be barred from having her aforesaid dower from the time of the death of the said John Watson, heretofore her husband, because her said husband died seized in his demesne as of fee, and that she, after his death, and before suing out the original writ, to wit, on the 9th of September, in the 13th year of the reign of Victoria, at, &c., required the said John Watson, the tenant, to render her, the said Sarah, her reasonable dower aforesaid. Verification. Therefore, she prays judgment and her seizin of the third part of the said premises, with the appurtenances, together with her damages on occasion of the detention of the same from the time of the death of the said John Watson, heretofore her husband, to be adjudged to her.

Rejoinder, that the said Sarah Watson did not require him, the said tenant, to render, &c., in manner and form. Issue thereon.

At the trial, before Cresswell, J., at the Cumberland Summer Assizes, it was proved that the husband of the demandant died on the 17th of November, 1843, and that the annual value of the sum payable for dower was 23*l.* 6*s.* 8*d.* It was admitted on the trial, that for three or four years a sum of money had been paid to the demandant in lieu of dower, and that afterwards there was a refusal by the tenant to pay any more; but this refusal was not made personally to the demandant, but to one Isaac Watson, a brother of the tenant, who stated that he applied to the tenant on the premises, for his mother, and asked him if he would pay his mother her thirds, and that the tenant replied, "No." This was the demand and refusal relied upon by the demandant.

It was contended, for the tenant, that upon these facts and plead-

¹ 20 Law J. Rep. (N. S.) C. P. 25.

Sarah Watson, Demandant, John Watson, Tenant.

ings, the demandant was at most only entitled to damages from the time of the demand to assign dower, which was on the 9th of October, 1849; and further, that there was no evidence of a demand at all to support the replication. The learned Judge was of opinion that the damages should be computed from the death of her husband, and that there was evidence of a demand, and he directed a verdict for the demandant, with 116*l.* 13*s.* 4*d.* damages, being the amount of dower reckoning from the death of her husband, and gave the tenant leave to move to reduce the damages to 23*l.* 6*s.* 8*d.*, the amount of dower for one year, if the Court should think that the demandant could only recover damages from the time of the demand.

S. Temple now moved accordingly. The widow is not entitled to her dower until she has made a demand upon the tenant to assign dower, and cannot be entitled to damages except from the date of such demand. In *Co. Litt.* 326, it is said, "Some say that the demandant in a writ of dower, that delayeth herself, shall not recover damages; therefore let the demandant take heed thereof. It is necessary for the wife, after the decease of her husband, as soon as she can, to demand her dower before good testimony, for otherwise she may by her own default lose the value after the decease of her husband, and her damages for detaining of her dower." So *Bacon's Abr.*, "Dower," I. p. 392: "Damages must be after demand of dower; for the heir is not bound to assign this provision till demanded, because the law casts the freehold of the whole upon him, which cannot divide without the concurrence of the wife; but a demand *in pais* before good testimony is sufficient." These passages show that damages can only be recovered from the time of demand. The issue upon the plea is divisible, and may be applied only to the damages subsequent to the demand.

[*WILLIAMS, J.* No; issue is joined as upon a common plea of tender. If it is proved that at any time the tenant was required to render dower and did not, the plea is falsified, and upon this issue the demandant is entitled to dower from her husband's death.]

Secondly, there was no evidence that the tenant was so required. The only demand was by a third person. The demand must be by the widow herself, before a witness, and it must be a formal demand to set out by metes and bounds. Lord Coke, in the passage above cited, shows that the demand must be in the presence of witnesses. He says, "To demand her dower before good testimony."

[*MAULE, J.* Lord Coke does not say that the demand may not be perfectly good, though not made before witnesses. There was here good evidence of a demand by Mrs. Watson, through her son Isaac.]

*Per Curiam.*¹ — Rule refused.

¹ *JERVIS, C. J., MAULE, J., WILLIAMS, J., and TALFOURD, J.*

Brown v. Arundell.

BROWN v. ARUNDELL.¹

November 5, 1850.

*Distress — Privilege — Goods sent to Auctioneer to be sold —
“ Public ” Trade.*

Goods sent to an auctioneer to be sold in a room hired by him from one who has no authority to let it, are privileged from distress, while they are in that room for the purpose of being sold by auction.

The fact of such room never having been used as an auction room before, and only being hired for the occasion, is immaterial, as regards the privilege of the goods from distress.

TROVER for goods. Plea — not guilty.

At the trial, before Pollock, C. B. at the Summer Assizes, for Hertford, the following facts were proved: The defendant was lessee, for a long term, of the Turf Hotel, at St. Alban's. One Coleman had rented the premises from the defendant for a time; but, at the time in question, Coleman had taken to the tap, and occupied that part of the premises only, as tenant to Messrs. Quick & Dell, the whole being then let to Messrs. Quick & Dell, and the rest remaining unoccupied. The key of the premises was still kept by Coleman. At the time in question, Coleman was absent, but had left the key in the possession of his son. Coleman the younger, having no authority from any one, let a room of the unoccupied premises to one Page, an auctioneer, who advertised a sale to be held there. Goods belonging to several people were brought into the room, to be sold by Page at the auction, amongst others, the goods in question, belonging to the plaintiff. The defendant, hearing that there were goods on the premises, and there being rent in arrear from Quick & Dell, came to the premises while the auction was proceeding, stopped the sale, and seized the goods in question for a distress.

It was contended, for the plaintiff, that the goods, under the circumstances, were privileged from distress, on the authority of *Adams v. Grane*, 1 Cr. & M. 380; s. c. 2 Law J. Rep. (N. S.) Exch. 105. The learned Judge was of that opinion, and directed a verdict for the plaintiff, giving the defendant leave to move to enter a nonsuit.

Montagu Chambers (November 5) moved accordingly. The goods in this case were not privileged from distress. *Adams v. Grane* does not apply. There the room was a public auction room, regularly used for the purpose of auctions, not a private room, as here; that is the distinction.

[MAULE, J. Is it not a public auction-room as soon as a public auction is advertised to take place there?]

[WILLIAMS, J. In *Finden v. M'Laren*, 6 Q. B. Rep. 891; s. c. 14 Law J. Rep. (N. S.) Q. B. 183, there was a demurrer to the replication, stating, as one of its grounds, that the trade was not a public trade, and the Court gave judgment for the plaintiff.]

¹ 20 Law J. Rep. (N. S.) C. P. 30.

It is submitted, at all events, that the room must be an auction-room known as such. Merely being used once is not sufficient.

[MAULE, J. That clearly makes no difference.]

Then Coleman the younger had no authority to let, and the auctioneer was a mere trespasser.

[JERVIS, C. J. Are the goods the less privileged on that account?]

[MAULE, J. If the goods are in the auctioneer's possession for the purposes of sale, they are privileged on that ground, wherever they may be.]

Per Curiam.¹ This case is governed by the law laid down in *Adams v. Grane*, and the goods were privileged from distress. We cannot try a question of title in such a case as this; nor can the privilege from distress depend upon whether the person having the charge of the goods, for the purpose of sale, is a trespasser. Of that, however, there is here no evidence; for there is nothing to show that any one objected to the use of the room by the auctioneer. — *Rule refused*.

SMITH AND COLES v. LOVELL.²

November 14 and 25, 1850.

Contract — Rent, Continuance of — Pleading — Surrender — Eviction — Special Traverse — Inducement — Inconsistency — Traverse too large — Argumentativeness.

The first count of the declaration averred that the plaintiffs C. and S., being tenants to H. of certain chambers, at a certain rent, payable quarterly, underlet them to the defendant, who undertook to pay the said rent to H., and agreed that if he did not do so, he would indemnify the plaintiffs in respect thereof, and that the defendant did not pay the rent to H., nor indemnify the plaintiffs:—

Held, that whether the contract meant that the defendant was to pay to H. the rent due from the plaintiffs to H., or to pay the rent under the demise from the plaintiffs, the promise of the defendant to pay did not extend beyond the term of his own tenancy.

Pleas — *sixth*, surrender by operation of law; *seventh*, that the plaintiff C., on behalf of himself and the plaintiff, S., agreed with the defendant that he should give up possession of the chambers, and that he did give up possession before the rent became payable; *eighth*, that C., with the sanction and authority of his co-plaintiff, evicted the defendant; *eleventh*, (to counts for use and occupation, and on an account stated,) discharge of the defendant under the Insolvent Debtors Act:—

Held, that these pleas were good.

Replication to the sixth plea, a special traverse, alleging that the defendant quitted possession of his own wrong; and that, according to the terms of an agreement, the plaintiff recovered possession of the chambers, to the intent that they might let them for the benefit of the defendant, and not otherwise, *absque hoc* that they were duly surrendered:—

Held bad, on demurrer, because the inducement was inconsistent with the traverse.

Replication to the seventh plea, traversing the agreement by the plaintiff C. on behalf of himself and S., and his performance of the agreement; and replication to the eighth plea, traversing the eviction by C., with the sanction and authority of S.:—

¹ JERVIS, C. J., WILLIAMS, J., and TALFOURD, J.

² 20 LAW J. REP. (N. S.) C. P. 37.

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Held bad, on general demurrer, as both being too large, from putting in issue the fact that C. had authority from B.

Replication to the eleventh plea, as to the third count, that the cause of action accrued after the order and adjudication in that plea mentioned :—

Held bad, as amounting to an argumentative denial of the allegation in the plea, that the order and adjudication were made after the causes of action accrued.

ASSUMPSIT. The first count of the declaration stated, that heretofore, to wit, on the 4th of December, 1846, the plaintiffs were tenants of certain chambers to one William James Heale, clerk, and were liable to the payment of a certain rent, to wit, the rent of 84*l.* a year, payable quarterly, in respect thereof, and so continued from that day until the 25th of March, 1849; and that heretofore, to wit, on the 5th of December, 1846, in consideration that the plaintiffs, at the request of the defendant, would demise and underlet to the defendant the said chambers, with the appurtenances, to hold the same to the defendant, as tenant thereof to the plaintiffs, from Christmas day then next, at and under a certain rent, to wit, the rent of 84*l.* per annum, payable quarterly, to wit, on the 25th of March, the 24th of June, the 29th of September, and the 25th of December, in each and every year, he, the defendant, then promised the plaintiffs, that he would pay the said rent to the said W. J. Heale; and that, if he, the defendant, should not pay the said rent to the said W. J. Heale, he, the defendant, would indemnify and save the plaintiffs harmless in respect thereof, and pay the same to the plaintiffs. And the plaintiffs aver that they did accordingly, to wit, on the said 5th of December, 1846, let the said chambers to the defendant, on the terms aforesaid; and under and by virtue of the said demise, the defendant held and enjoyed the said chambers, with the appurtenances, as tenants thereof to the plaintiffs, for a long time, to wit, from Michaelmas, in the year last aforesaid, until and upon the 25th of March, 1849; and that, on the 29th of September, 1847, and on divers other days and times between that day and the commencement of this suit, divers sums of money, amounting in the whole to a large sum of money, to wit, to the sum of 126*l.*, parcel of the rent aforesaid, became and was due and payable from the plaintiffs to the said W. J. Heale; and the defendant, although thereunto requested by the plaintiffs so to do, on the 25th of March, 1848, and on divers other days and times between that day and the commencement of this suit, did not pay the said several sums of money, or any part thereof, to the said W. J. Heale; and that, on the 21st of July, 1848, and on divers other days and times between that day and the commencement of this suit, the plaintiffs paid to the said W. J. Heale divers large sums of money, to wit, divers sums of money, amounting in the whole to the said sum of 126*l.*; and that, on the said 21st of July, 1848, and on divers other days and times between that day and the commencement of this suit, the defendant was requested by the plaintiffs to pay them the said several sums of money respectively, yet the defendant, disregarding his promises, hath not paid the said several sums of money respectively, or any part thereof.

Second count, for use and occupation, and third count, upon an account stated.

Sixth plea, as to so much of the said first count of the said declaration as relates to the said sum of 84*l.*, part and parcel of the said sum of 126*l.* of the rent in the said first count mentioned, and therein alleged to have become due and payable from the plaintiffs to the said W. J. Heale, the defendant says that, after the making of the said agreement in the said first count mentioned, and before any part of the said sum of 84*l.* of the rent in the said first count mentioned accrued or became due or payable from the plaintiffs to the said W. J. Heale, and whilst the defendant held and enjoyed the said chambers, with the appurtenances, as tenants thereof to the plaintiffs, as in the said first count mentioned, and before the 24th of June, 1848, and before the commencement of this suit, to wit, on the 12th of June, 1848, all the estate, term and interest, and the tenancy of the defendant in the said chambers, with the appurtenances, were duly surrendered by the defendant to the plaintiffs, by act and operation of law, (that is to say,) by the defendant then quitting possession of the said chambers, with the appurtenances, by the consent of the plaintiff H. T. Coles, and by the defendant then delivering up the keys of the outer and other doors of the said chambers to the plaintiff H. T. Coles, and by the defendant then relinquishing and giving up the possession and enjoyment of the said chambers to the plaintiff H. T. Coles, with the intention of putting an end to the said tenancy in the said first count mentioned, and by the plaintiff H. T. Coles, then accepting the said keys of the outer and other doors of the said chambers, and such possession and enjoyment of the said chambers, with the appurtenances, with the intention of putting an end to the said tenancy in the said first count mentioned. And further, that he has not from thence hitherto held or enjoyed, or had any further use or occupation of the said chambers, or any part thereof. And further, that the plaintiff H. T. Coles, in giving such license, and in accepting the said keys and such possession of the said chambers, acted for and on behalf of himself and the said other plaintiff, Charles Smith, with the authority of the plaintiff, C. Smith, and that the plaintiff H. T. Coles, from thence until and upon the said 25th of March, 1849, has been in the actual possession, occupation, use, and enjoyment, with the assent of the plaintiff C. Smith, of the said chambers, with the appurtenances. Verification.

Seventh, as to so much of the said first count of the said declaration as relates to the sum of 84*l.*, parcel of the said sum of 126*l.* of the rent in the said first count mentioned, and therein alleged to have become due and payable from the plaintiffs to the said W. J. Heale, the defendant says that before the said sum of 84*l.*, parcel of the said rent in the said first count mentioned, accrued or became due from the plaintiffs to the said W. J. Heale, and before the 24th of June, 1848, to wit, on the 12th of June, 1848, it was agreed by and between the plaintiff H. T. Coles, for and on behalf of himself and the said other plaintiff, C. Smith, and with his authority, that the defendant should quit and deliver up to the plaintiff H. T. Coles, and that the plaintiff

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H. T. Coles, for and on behalf of himself and the said other plaintiff, C. Smith, should take possession of the said chambers, with the appurtenances, before the said 24th of June, 1848, to wit, on the 12th of June, 1848, and that in consideration thereof, the defendant should be discharged from all liability to pay any further rent or other compensation which would otherwise become due for the holding, occupying or enjoying of the said chambers with the appurtenances. And further, that in pursuance of the said agreement, he, the defendant, afterwards, to wit, on the said 12th of June, 1848, being before the said 24th of June, 1848, and before the commencement of this suit, did quit and deliver up possession of the said chambers with the appurtenances to the plaintiff H. T. Coles, and the plaintiff H. T. Coles, for and on behalf of himself and the said other plaintiff, C. Smith, and with his authority, then accepted such possession in pursuance and on the terms of the agreement in this plea mentioned, and in discharge of the liability of the defendant to pay any more or further rent or compensation for the said chambers, with the appurtenances. And the plaintiff H. T. Coles then, with the authority of the said other plaintiff, C. Smith, then entered into and upon the said chambers with the appurtenances, and thenceforth hitherto hath remained and continued in possession thereof; and the defendant hath not, since he so quitted and gave up possession of the same, held, used, or enjoyed the same. Verification.

Eighth, to the sum of 84*l.* parcel of the said sum of 126*l.* of the rent in the said first count mentioned, and therein alleged to have become due and payable from the plaintiffs to the said W. J. Heale, the defendant says, that after the making the said agreement in the said first count mentioned, and before any part of the said sum of 84*l.* parcel of the said rent in this said first count became due and payable from the plaintiffs to the said W. J. Heale, and before the 24th of June, 1848, and before the commencement of this suit, to wit, on the 12th of June, 1848, the plaintiff H. T. Coles, with the sanction and authority of the other plaintiff, C. Smith, with force and arms, &c., and against the will and consent of the defendant, wrongfully entered into and upon the said demised premises with the appurtenances, and then ejected and expelled, put out and removed the defendant from the possession, use and occupation, and enjoyment thereof, and kept and continued the defendant so ejected, expelled, put out and removed from thence hitherto; and the defendant hath not at any time since such entry and eviction had any use, possession, occupation or enjoyment thereof, or derived any benefit therefrom. Verification.

Eleventh, as to the said second and third counts of the said declaration, the defendant says, that after the making of the promises in the said second and third counts of the said declaration mentioned, and before the commencement of this suit, to wit, on the 18th of June, 1848, by a certain order and adjudication then made by the Court for the Relief of Insolvent Debtors in England, held at the court house in Portugal Street, in the county of Middlesex, he, the defendant, was duly discharged according to a certain act of Parliament made and passed in a session of Parliament held in the first and second years

of the reign of her Majesty Queen Victoria, being "An Act for abolishing arrest on mesne process in civil actions except in certain cases, for extending the remedies of creditors against property of debtors, and for amending the laws for the relief of insolvent debtors in England," of and from the said several causes of action in the said second and third counts of the said declaration mentioned, and each of them, which said order remains in force. Verification.

Replication to the sixth plea, that the defendant of his own wrong quitted the possession and occupation of the said chambers with the appurtenances, because the plaintiffs say, that on a certain day, to wit, on the 5th of December, 1846, it was agreed between the plaintiffs and the defendant, in consideration that the defendant would become tenant of the said chambers to the plaintiffs and indemnify and save them harmless in respect of the rent thereof in manner and form as in the first count of the declaration mentioned, that in case the plaintiffs should give notice to the defendant to terminate that agreement, and the defendant should be desirous of continuing his occupation of the premises as tenant to the said W. J. Heale or his assigns, then and in such case that the plaintiffs should not, either jointly or severally, occupy the said premises or interfere to prevent any arrangement which the defendant might be desirous of making for continuing his occupation of the said premises under the said W. J. Heale or his assigns. And the plaintiffs say that they were always ready and willing, and still are ready and willing, to permit and suffer the defendant to continue the occupation of the said chambers under the said W. J. Heale, and that they did not interfere to prevent the defendant from entering into any arrangement with the said W. J. Heale as therein mentioned, and that afterwards, to wit, on the 24th of March, 1848, the plaintiffs received the keys of the outer and other doors of the said chambers from the defendant, and afterwards took possession thereof at the request of the defendant, to the intent that they might be able to let the said chambers for the benefit of the defendant, and that they refused to receive the keys of the outer and other doors of the said chambers from the defendant, except on the terms that the defendant should not be released from his liability in respect thereof, and that the keys of the outer and other doors of the said chambers and the possession of the said chambers were received by the plaintiffs from the defendant on no other terms or conditions than on the terms that the defendant should not be released from his liability under the agreement in the first count of the declaration mentioned or referred to; without this, that all the estate, term and interest, and the tenancy of the defendant in the said chambers, with the appurtenances, were duly surrendered by act and operation of law, in manner and form as in that plea alleged.

Replication to the seventh plea, that it was not agreed by and between the plaintiff H. T. Coles, for and on behalf of himself and the plaintiff C. Smith, and the defendant, that the defendant should be discharged from all liability to pay any further rent or other compensation which should become due in respect of the said chambers with the appurtenances, nor was possession accepted of the said chambers

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with the appurtenances in pursuance of the alleged agreement in that plea mentioned in discharge of the defendant's liability to pay any more rent or compensation for the said chambers with the appurtenances, *modo et formâ*.

Replication to the eighth plea, that the plaintiff H. T. Coles did not eject, expel, put out and amove the defendant from the possession, use, occupation, and enjoyment of the said chambers with the appurtenances, with the sanction and authority of the plaintiff C. Smith, in manner and form as in that plea alleged, concluding to the country.

To so much of the eleventh plea of the defendant pleaded to the second and third counts of the declaration as relates to the third count of the declaration, that the cause of action in the third count mentioned accrued to the plaintiffs after the 18th of June, 1848, and after the making of the order and adjudication in that plea mentioned. Verification.

To these replications the defendant demurred specially.

Willes, (November 14,) in support of the demurrers. The replications are bad, and the pleas good. The declaration avers that the plaintiffs were tenants of certain chambers to Heale, at a yearly rent, and that in consideration that they would underlet the chambers to the defendant, he, the defendant, promised to pay Heale the rent, or if he did not, to indemnify the plaintiffs, and that the defendant did not pay to Heale or to the plaintiffs. The sixth plea states a surrender by operation of law by the defendant giving up, and the plaintiffs accepting possession of the premises; and the replication to that plea by way of special traverse, is an argumentative denial of its allegations, and the first part of it is inconsistent with the latter part. The seventh plea alleges an agreement between the defendant and one of the plaintiffs on behalf of himself and the other plaintiff, that the defendant should give up possession, and further avers that possession was given up in pursuance of the agreement; and the replication to that plea is bad for duplicity, inasmuch as it puts in issue not only the agreement, but the performance of it. The eighth plea alleges an eviction by one of the plaintiffs with the consent of the other; and the replication to it, as well as that to the seventh plea, is bad for attempting to put in issue the authority of the plaintiff Coles to act for the other plaintiff, Smith. *Wallace v. Kelsall*, 7 Mee. & W. 264; s. c. 10 Law J. Rep. (N. S.) Exch. 12, and *Gore v. Wright*, 8 Ad. & E. 118; s. c. 7 Law J. Rep. (N. S.) Q. B. 147. The replication to the eleventh plea, which sets up the discharge of the defendant under the Insolvent Act, is bad, because it ought to have traversed the discharge, or there should have been a new assignment. *Morrison v. Chadwick*, 7 Com. B. Rep. 266; s. c. 18 Law J. Rep. (N. S.) C. P. 189.

H. T. Coles, for the plaintiffs.

[JERVIS, C. J. It is difficult to see what is the real agreement between the parties, as expressed by the declaration: whether the promise is to pay Heale the rent due from the plaintiffs, or to pay him the rent due from the defendant to the plaintiffs under their demise.]

The declaration alleges a personal contract on the part of the defendant, unconnected with the relation of landlord and tenant. The case is analogous to that of *Harley v. King*, 2 Cr. M. & R. 18; s. c. 4 Law J. Rep. (N. S.) Exch. 144, where it was held, that the assignee of a lease was liable for a breach of a covenant running with the land, which took place in his own time, though the action was not commenced until after he had assigned the premises.

[JERVIS, C. J. The declaration states a promise to pay the "said rent." What rent does that mean?]

The "said rent" refers to the amount, (84*l.*.) and the contract is for an indemnity for the payment of that amount. The inducement to the special traverse in the replication to the sixth plea is not inconsistent with any rule of pleading. As to the seventh plea, it is double, and the plaintiffs are thereby exposed to a difficulty in replying to it. It alleges an agreement and the performance of it, and the plaintiffs have taken issue on both points, as they constitute together but one defence. The replication to the eleventh plea must be held to amount to a new assignment, although particular words may be omitted from it. *Monkman v. Shepherdson*, 11 Ad. & E. 411; s. c. 9 Law J. Rep. (N. S.) Q. B. 134.

Willes, in reply. The agreement in the first count is really for the defendant to pay Heale the rent of 84*l.* in order to save the plaintiffs the trouble; but whether the contract be to pay rent to Heale, or to pay the rent due to the plaintiffs under their demise to the defendant, the pleas afford good answers to the action. The declaration must receive a reasonable and grammatical construction; and according to the doctrine laid down in *Wolveridge v. Steward*, 1 Cr. & M. 644; s. c. 3 Law J. Rep. (N. S.) Exch. 360, the rent must be confined to the time of occupation. — *Cur. adv. vult.*

JERVIS, C. J., (November 25,) asked Coles if he would take leave to amend his replications, which he declined to do, and his Lordship delivered the judgment of the Court.¹ In this case there is no little difficulty in construing the first count of the declaration. It alleges that the plaintiffs were tenants of certain chambers to one Heale, at the rent of 84*l.*, payable quarterly, and that, in consideration that they would demise and underlet the chambers to the defendant to hold as their tenant at a rent of 84*l.*, payable quarterly, he promised them that he would pay *the said rent* to Heale, and that if he should not do so he would indemnify them in respect thereof, and would pay the same to them. The declaration then avers, that the plaintiffs did let the chambers to the defendant on the terms aforesaid, and that under that demise he held the chambers; that large sums of money, parcel of the rent aforesaid, became due from the plaintiffs to Heale; that the defendant did not pay it to Heale; that the plaintiffs paid him, and requested the defendant to pay them; but he hath not done so, &c. It is not easy to say whether, by this statement,

¹ JERVIS, C. J., WILLIAMS, J., and TALFOURD, J.

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the plaintiffs mean to allege the contract to have been that the defendant promised to pay Heale the rent due from them to Heale, or the rent due from the defendant to them under the demise which is the consideration for his promise. But whichever may be meant, the plaintiffs cannot, we think, be understood as intending to allege that the defendant's promise to pay Heale was to extend further than his liability to pay rent under his own tenancy to the plaintiffs; and, consequently, we are of opinion, that the sixth plea, which is addressed to 84*l*, parcel of the rent mentioned in the first count, and which sets up as a defence that before it grew due from the plaintiffs to Heale, the tenancy of the defendant to the plaintiffs had ended by a surrender by operation of law, is a good plea; the plaintiffs have replied to it by way of special traverse. To this replication the defendant has demurred specially, on the ground that the inducement is inconsistent and incongruous with the traverse; and we think that it plainly is so, and therefore our judgment on this demurrer must be for the defendant.

The seventh plea is likewise addressed to the same sum of 84*l*, and it alleges that before it became due from the plaintiffs to Heale, it had been agreed by and between the plaintiff Coles, for and on behalf of himself and the plaintiff Smith, and with his authority, and the defendant, that the defendant should quit and deliver up the possession of the chambers to the plaintiff Coles, and that in consideration thereof the defendant should be discharged from all further liability to pay any rent for the chambers, and that the defendant did accordingly deliver up possession to the plaintiff Coles, which he, on behalf of himself and the plaintiff Smith, accepted. Construing the first count of the declaration as we do, we think this plea also sets up a good defence by way of executed contract, according to the case of *Gore v. Wright*. The plaintiffs have replied to this plea, by traversing that it was agreed by and between the plaintiff Coles, for and on behalf of himself and the plaintiff Smith and the defendant, that the defendant should be discharged from liability to pay any further rent, and that possession was accepted, in pursuance of the alleged agreement in discharge of the defendant's liability, in manner and form, &c. To this replication the defendant has specially demurred, on the ground that it is double and multifarious, inasmuch as the plaintiffs have denied not only the agreement alleged, but also the acceptance of the possession of the chambers in pursuance thereof. It is unnecessary for us to decide whether this is a sufficient cause of demurrer, or whether the plaintiffs are entitled by their replication to deny the whole of the matters alleged in the plea, as constituting a single point of defence, because we are of opinion that the replication is bad for another cause, not specially assigned, but which we regard as an objection of substance, viz., that the traverse is too large by reason of including the allegation in the plea of the agreement therein mentioned having been made by the plaintiff Coles, for and on behalf of the plaintiff Smith as well as of himself. The case of *Wallace v. Kelsall* appears to us to prove that the plea would contain a good bar without this allegation. If this be so, the traverse is bad

(and in our opinion bad on general demurrer) if it would put the defendant, on the trial of the issue, under the necessity of proving the allegation in order to obtain a verdict. And we have come to the conclusion that this would be the effect of the traverse after considering the authorities relating to the point, the principal of which are cited and fully discussed in the judgment of the Court of Exchequer, in the late case of *Lush v. Russell*, 19 Law J. Rep. (N. S.) Exch. 244, though the decision itself of that case does not at all govern the present point. Therefore on this demurrer also our judgment must be for the defendant.

The eighth plea is also addressed to the same sum of 84*l.*, and alleges that before it became due from the plaintiffs to Heale, the plaintiff Coles, with the sanction and authority of the plaintiff Smith, evicted the defendant from the chambers. The plaintiffs have replied traversing that the plaintiff Coles evicted the defendant with the sanction and authority of the plaintiff Smith. To this replication the defendant has demurred, and it appears to us to be open to the same objection as the replication to the seventh plea, viz., that the traverse is too large, by reason of including the immaterial allegation that the eviction was authorized by the plaintiff Smith. On this demurrer, therefore, our judgment must likewise be for the defendant.

The eleventh plea is addressed to the second and third counts of the declaration, (the former being for use and occupation, and the latter on an account stated,) and it avers that after the causes of action accrued, and before action brought, the defendant was discharged by the order and adjudication of the Insolvent Court. The plaintiffs have replied as to so much of this plea as relates to the third count, that the cause of action accrued after the order and adjudication in the plea mentioned. To this replication the defendant has demurred specially, on the ground of its amounting merely to an argumentative denial of the allegation in the plea that the order and adjudication were made after the causes of action; and as this is plainly a fatal objection to the replication, our judgment on this demurrer also must be for the defendant. — *Judgment for the defendant.*

JONES v. IVES.¹

November 12, 1850.

Practice — Award — Taxation of Costs.

Where the cause and all matters in difference were referred by order of *nisi prius*, and the costs of the cause were to abide the event, and the arbitrator found that there was no other matter in difference than the subject matter of the action, and ordered a verdict to be entered for the plaintiff, the Court refused to allow the plaintiff to sign judgment and tax the costs before the expiration of the term after the award was made, and within which the defendant might move to set the award aside.

¹ 20 Law J. Rep. (N. S.) C. P. 69. 15 Jur. 107.

Jones v Ives.

T. JONES moved for a rule calling on the defendant to show cause why the plaintiff should not be allowed to sign judgment, and the Master grant his *allocatur* for the plaintiff's costs. The cause and all matters in difference between the parties were referred by an order of *Nisi Prius* at the sittings in Easter term last; the costs of the cause were to abide the event, and the costs of the reference to be in the discretion of the arbitrator. The arbitrator, by his award, which was made in June last, ordered the verdict to be for the plaintiff, for 50*l.*, and directed the defendant to pay the costs of the cause and of the reference. There was, in fact, no other matter in difference between the parties than the subject matter of the action, and so the arbitrator found. The Master taxed the plaintiff's costs, but he refused to give his *allocatur*, because he said the defendant ought to have the whole of Michaelmas term to apply in to set aside the award. Although it is admitted, that as the reference was of all matters in dispute, and was not confined to the action, the defendant has all the term to apply in to set aside the award, yet still, it is submitted, the plaintiff is not bound to wait until the end of the term. In *Cromer v. Churt*, 15 M. & W. 310; s. c. 15 Law J. Rep. (N. S.) Exch. 263, where a verdict was taken by consent for the plaintiff at *Nisi Prius*, subject to the certificate of a barrister, and he gave his certificate directing the verdict to stand for a certain amount, it was held, that final judgment might be signed immediately on the entry of this verdict; and in *Little v. Newton*, 1 Man. & G. 978; s. c. 3 Jur. 246, the cause and all matters in difference were referred by agreement, and the award having directed that the costs of the cause and of the award should be paid by the defendant, it was held, that the plaintiff was entitled to have these costs taxed at once, without waiting for the expiration of the time during which the defendant would be at liberty to move to set the award aside. [*Jervis*, C. J., referred to *Hobdell v. Miller*, 2 Scott's N. R. 163. In that case, where the reference was of the cause and all matters in difference by order of *Nisi Prius*, and upon application for a rule to show cause why the Master should not proceed to tax the plaintiff's costs, counsel contended that the plaintiff was not prevented from having his costs at once taxed, and cited *Hayward v. Phillips*, 6 Ad. & El. 119; s. c. 1 Jur. 102, and *Doe d. Madkins v. Horner*, 8 Ad. & El. 235; s. c. 2 Jur. 417, upon which occasion Maule, J., said, "The first of the cases cited has little to do with the present case, and the last nothing." How can the plaintiff have costs taxed before it is certain that he can sustain the award?] The case of *Little v. Newton* is in opposition to that. [*Maule*, J. — All that was allowed to be done in *Little v. Newton* has been done in the present case; and that case, so far from opposing, was decided in support of *Hobdell v. Miller*.] The taxation of the costs without the Master's *allocatur* is worthless; and, indeed, the costs cannot be said to be taxed without it. The reason for allowing the costs to be taxed in the cases cited equally applies to what is now asked by the plaintiff; it is, that he may not be delayed in putting the judgment in execution immediately after the expiration of the time within which the defendant may move to

set the award aside. *Jervis*, C. J. — The two cases of *Little v. Newton* and *Hobdell v. Miller* are perfectly reconcilable. The distinction is well pointed out by the Solicitor General in his argument in *Little v. Newton*, "the reference there (*viz.*, in *Hobdell v. Miller*) being by an order of *Nisi Prius*, and there being a verdict entered for the plaintiff." Where the reference is by agreement only, the arbitrator is the person to tax the costs, which he may do by substituting the officer of the Court to fix the amount of the costs; and the costs then, when taxed, become part of the award. The costs, therefore, are in that case intended by the parties to be taxed at once, and there is no occasion to wait; but where the reference is by order of *Nisi Prius*, the taxing of the costs must follow the ordinary course, which must be when judgment can be signed, which, in the present case, cannot be until after the expiration of the term. — *Rule refused.*

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CRESWICK v. HARRISON.¹

November 22, 1850.

Arbitration—Award de Præmissis—1 & 2 Vict. c. 110, s. 18—Order to pay—Attachment.

A cause and all matters in difference between the parties were, by a judge's order after issue joined, referred to an arbitrator, who recited the order of reference, and made his award "of and concerning the premises so referred as aforesaid:" —

Held, that the award was final, although the arbitrator had not, in express terms, adjudicated upon a matter submitted to him. ●

The plaintiff having obtained a rule calling on the defendant to show cause why he should not pay a sum of money, pursuant to the award, the Court, being of opinion that it was not a case in which they would have granted an attachment, discharged the rule.

Semble, the 1 & 2 Vict. c. 110, s. 18, was intended to apply to rules made according to the then existing practice of the Courts, and not to introduce a new practice of making rules such as that sought to be made absolute in the present case.

The case of *Gyde v. Boucher*, 5 Dowl. 127, doubted.

A RULE had been obtained by the defendant, calling upon the plaintiff to show cause why the award in this case should not be set aside, on the ground that it was not final and conclusive, as the arbitrator had not decided all the matters in difference between the parties. It appeared from the affidavits, that the plaintiff was the public officer of the Sheffield and Rotherham Joint-stock Banking Company, and the defendant was their late manager. The action was assumpsit for money had and received. Plea, amongst others, accord and satisfaction. The cause and all matters in difference were, after issue joined, referred to an arbitrator by a judge's order, with power to the Court to refer the matters back to the arbitrator. Upon the reference, the company sought to charge the defendant with liabilities, comprised in their particulars of demand, extending over eleven years, up to the

 Creswick v. Harrison.

3d April, 1848; in answer to which the defendant proved, that, in pursuance of agreement of that date between himself and the solicitor to the company, he had, at a meeting of the directors, deposited with them his title-deeds to certain property at T., as a security for 2700*l.*; and the agreement contained these words: "The above 2700*l.* to be accepted in full of all demands." Subsequently, the company, having discovered that other sums than those comprised in the particulars of demand were due to them from the defendant prior to the 3d April, 1848, brought them also before the arbitrator; and as to these the defendant pleaded the Statute of Limitations, and also contended that the agreement was a good answer to the whole demand, but that, if the arbitrator was of opinion that the plaintiff was entitled to recover more than 2700*l.*, and that the delivery of the deeds was an accord only, and not a satisfaction, nevertheless the defendant was entitled to bring a cross action against the company for a breach of it, or a suit in equity for a specific performance; and that this was a matter in difference for the arbitrator to determine. The award was published on the 28th October, 1850, which, after the usual recitals, was in these words: "I do make and publish this my award in writing of and concerning the premises so referred as aforesaid—that is to say," &c. The arbitrator then found each issue joined in the action in favor of the plaintiff, and awarded that the defendant should pay to the company the sum of 8139*l.*, and that the same should be received by them in full satisfaction of their demands so referred to him as aforesaid; and that the title-deeds should be held by them as a security for 2700*l.*, and interest at 5*l.* per cent., parcel of the said 8139*l.*, down to the 6th November: that on payment of the 2700*l.* and interest on the 6th November, the company should deliver up the title-deeds; and on payment of the residue, should give a release of all claims whatsoever, &c. The submission was subsequently made a rule of Court.

Cowling now showed cause. The award sufficiently shows that the defendant's right to a cross action has been decided, for it directs that the title-deeds are to be held as a security for 2700*l.*, and to be delivered up on payment of that sum; and on payment of the residue, the defendant is to be released forever. The defendant, by his affidavit, says that the arbitrator does not appear to have decided all matters in difference; but in 1 Wms. Saund. 33 a, note (b.) it is said, "And it should seem, that even where there is no award of general releases, the silence of the award as to some of the matters submitted, and brought before the arbitrator, does not, *per se*, prevent it from being a sufficient exercise of the authority vested in him by the submission. An award is good, notwithstanding the arbitrator has not made a distinct adjudication on each or any of the several distinct matters submitted to him, provided it does not appear that he has excluded any." *Gray v. Gwennap*, 1 B. & Al. 106. *Hayllar v. Ellis*, 3 Moo. & P. 503. *Wynne v. Edwards*, 12 M. & W. 708; s. c. 13 Law J. Rep. (n. s.) Exch. 222; and *Dunn v. Warlters*, 9 M. & W. 293; s. c. 11 Law J. Rep. (n. s.) Exch. 188, are authorities for that

proposition. This award, being *de præmissis*, is sufficient: *Craven v. Craven*, 7 Taunt. 644, in which case Gibbs, C. J., says, "An award concerning the matters in difference is equivalent to an award on the premises, which, according to my recollection, must be taken to be final, as to all matters referred." The case upon the authority of which the present rule was granted (*Gyde v. Boucher*, 5 Dowl. 127) is inconsistent with the other cases, and they were not referred to on the argument.

Byles and *Miller, Serjs.*, in support of the rule. The award is bad, and ought to be referred back to the arbitrator. The question as to the defendant's right to a cross action was distinctly raised before the arbitrator, and that question it does not appear from the award that he has decided; in fact, it rather appears to the contrary, for he has ordered the company to release the defendant, but has not ordered him to release them. There ought to have been an award of mutual releases, or something equivalent to it: "of and concerning the premises" is insufficient. *Gyde v. Boucher* is directly in point; and in the conflict of authorities the principle, as stated, in *Dunn v. Warters*, by Lord Abinger, favors the defendant. In that case the award was "of and concerning the premises;" and his Lordship said, "If this matter had been *res integra*, I should certainly have been disposed to think that this award was void; but we are bound by the authorities which have been referred to, and cannot set it aside."

The plaintiff had also obtained a cross rule calling upon the defendant to show cause why he should not pay to the Sheffield and Rotherham Joint-stock Banking Company the sum of 8139*l.* 8*s.*, pursuant to the award.

Byles and *Miller, Serjs.*, showed cause. This is not a case in which the Court will make an order upon the defendant to pay this money, under the 1 & 2 Vict. c. 110, s. 18, for they would not grant an attachment for disobedience to the award. The justice of the case will be met by leaving the plaintiff, who contends for the validity of the award, to bring his action upon it.

Cowling, in support of the rule. This is entirely a matter for the discretion of the Court, and since the 1 & 2 Vict. c. 110, it has been usual to grant such orders on the ordinary affidavit. [*Maule, J.* — This Court is fallible, and the House of Lords may take a different view of the award. The defendant, therefore, says that the plaintiff should be left to his action on it.]

JERVIS, C. J. I think that the defendant's rule must be discharged. The object of it is, I understand, to have the whole matter reopened before the arbitrator, and not merely to rectify any supposed mistake in the award. But I think that there are no grounds for this, for in my opinion the award is final and conclusive. This rule was granted out of deference to a decision of my brother Coleridge,

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in *Gyde v. Boucher*; but at the time it was moved for, my brother Williams called attention to the note in 1 Wms. Saund., where several authorities expressly against the application were collected; in fact, the case of *Gyle v. Boucher* is the only authority in favor of it. As to the case of *Dunn v. Warblers*, I think that the expression made use of by Lord Abinger has been pressed too far; he does not seem to me to say that he decided that case contrary to his own opinion, but only that, had it not been for the current of authorities, he should have required more time to consider the matter. The other Judges expressed no doubts, but confirmed the previous decisions, the effect of which is, that where a cause and all matters in difference between the parties have been submitted to an arbitrator, it is sufficient if he awards "of and concerning the premises referred." That has been decided in all the cases except *Gyde v. Boucher*, which was referred to in *Dunn v. Warblers*, and not acted upon. As to the cross rule obtained by the plaintiff, I think that that ought not to be made absolute. I doubt whether the stat. 1 & 2 Vict. c. 110, s. 18, meant that the Court should make an order to pay where the applicant has, in the ordinary course of practice, his remedy by judgment. Before this statute no such orders were ever made, and I do not think it authorizes them to be made, but that it means that where, by the ordinary practice of the Courts, an order is made for the payment of money, that order shall have the effect of a judgment. At all events, I have a sufficient doubt in my mind as to the effect of the statute to justify me in refusing to make this order to pay. The plaintiff's rule will, therefore, be discharged.

MAULE, J. I also think that this award is good, being made *de præmissis*. What Lord Abinger says in *Dunn v. Warblers* is, not that he would have decided otherwise, except for the cases, but that he would have further considered the matter; and knowing well the great acuteness of Lord Abinger, I am satisfied that if he had considered it ever so much, he would have come to no other conclusion than that to which his learned predecessors had come. No distinction has been suggested between that and the present case. The whole current of authorities is against this application, and one case only in its favor, which may possibly be distinguishable, but not on any substantial grounds. I cannot but think that *Gyde v. Boucher* is at variance with previous decisions, and with the subsequent one in the Exchequer; and if the alternative be now to overrule that one case, or to decide against the whole current of authorities, it is not difficult to say which alternative we ought to adopt. I therefore think, that the defendant's rule for setting aside the award must be discharged. As to the cross rule, I go a long way with the opinion expressed by the Lord Chief Justice, and I have myself said something to the same effect on a former occasion. I think that the statute meant this — that, leaving the practice of the Courts with regard to orders as it stood before the act, when an order has been made, it shall give the party in whose favor it has been made the further remedy of execution as upon a judgment. Though that has been

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my opinion, I own that the Courts have acted otherwise, and have made orders which, but for the supposed authority of the statute, no one would have thought of asking for. The Courts have said that the statute is a reason for making such orders; but I think such orders are in the nature of attachments, and them it is always in the discretion of the Court to grant or to withhold, and they are only properly granted where parties contumaciously refuse to perform their duty in obedience to the process of the Court. The present is not a case of that kind; and although there are no grounds for setting aside this award, yet I cannot but think that the defendant has made this application *bona fide*, or, at any rate, that he may have done so; and if that be the case, I should not think it right to grant an attachment against him. It might be that we were wrong in holding this award to be good; and if we were wrong, and granted an attachment, the defendant would be precluded from rectifying our mistake in a Court of Error. This may be a reason for leaving the plaintiff to his action upon the award. Then, I think, if there is not sufficient reason to induce us to grant an attachment, that we ought not to make this order. The plaintiff's rule must, therefore, be discharged. — *Rules discharged without costs.*

 CALLANDER v. HOWARD.¹

November 25, 1850.

Costs where Issues in Fact found for Plaintiff, and Judgment for Defendant on Demurrer — 4 Ann. c. 16, s. 5.

To a declaration in assumpsit the defendant pleaded sixteen pleas; the plaintiff took issue on fifteen, and demurred to the sixteenth, which went to the whole cause of action. The fifteen issues were tried, and found for the plaintiff; but judgment was afterwards given for the defendant on the demurrer:—

Held, that the plaintiff was entitled, under the 4 Ann. c. 16, s. 5, to the costs of those issues; overruling *Partridge v. Gardner*, and *Howell v. Rodbard*, 4 Exch. R. 303, 309; affirming *Bird v. Higginson*, 5 Ad. & El. 83; and *Clarke v. Allatt*, 4 Com. B. R. 335.

WILLES (November 4) obtained a rule calling upon the defendant to show cause why the Master should not review his taxation. The action was assumpsit, and the declaration contained three counts by the drawer against the acceptor of three several bills of exchange, and also counts for goods sold and delivered, money paid, interest, and upon an account stated. To this there were sixteen pleas—four to the first count, four to the second, three to the third, one to the fourth and fifth counts, and four to the whole declaration. Issues in fact were taken upon all the pleas except the fifteenth, and were all found for the plaintiff at the trial at the sittings held in Guildhall after Michaelmas term, 1849. To the fifteenth plea, which was pleaded to the whole declaration, there was a demurrer, which was

¹ 20 Law J. Rep. (N. S.) C. P. 66. 15 Jur. 130.

argued in this Court, and judgment given for the defendant, in Trinity term, 1850. See 14 Jur. 672. The Master, on taxation, allowed the defendant the general costs of the cause, exclusive of the costs of the fifteen issues of fact, which latter costs the plaintiff claimed, but the Master refused to allow them.

Gray (November 25) showed cause. The Master was right in his taxation. The plaintiff, not having recovered damages, is not entitled to costs under the statute of Gloucester, nor under the 4 Ann. c. 16, s. 5, as no issue in fact has been found for the defendant. In *Yates v. Gun*, Barnes, 141, the earliest case in point, there was an issue in fact and a demurrer; and this Court held, that the plaintiff was entitled to the costs of the issue in fact, although the defendant succeeded on the demurrer. In *Cooke v. Sayer*, 2 Burr. 753, the Court of Queen's Bench refused the plaintiff his costs under the like circumstances, though certainly the previous case of *Yates v. Gun* was not cited. Subsequently, in *Bird v. Higginson*, 5 Ad. & El. 83; s. c. 6 Law J. Rep. (N. S.) K. B. 262, the Court of Queen's Bench adopted the construction put upon the statute by this Court in *Yates v. Gun*, and expressed themselves dissatisfied with the decision in their own Court in *Cooke v. Sayer*. This Court, in a subsequent case, *Clarke v. Allatt*, 4 C. B. 335, concurred with the Court of Queen's Bench in upholding *Yates v. Gun*; but the Court of Exchequer, in *Partridge v. Gardner*, 4 Exch. 303; s. c. 18 Law J. Rep. (N. S.) Exch. 415, and *Howell v. Rodbard*, Id. 309; s. c. 19 Law J. Rep. (N. S.) Exch. 350, after time taken to consider, overruled *Bird v. Higginson*; and in this conflict of authorities, the question is, Which decision will this Court uphold? [*Jervis, C. J.*—*Clarke v. Allatt* was not cited to the Court of Exchequer, nor do they appear to decide upon the terms of the statute.] The Court adopted the construction put upon it by previous decisions, and relied upon *Richmond v. Johnson*, 7 East, 583, which was followed by several similar cases. In *Richmond v. Johnson*, the defendant pleaded three pleas, on which issues were taken, and the plaintiff succeeded on all three. The Judge certified against more costs than damages, under the stat. 43 Eliz. c. 6, s. 2; but did not certify, under the statute of Anne, that the defendant had probable cause to plead the several matters. The Court held that the plaintiff was not entitled to more costs than damages. The effect of which decision is, that here, if the defendant had succeeded on some or one of the issues in fact, the statute of Anne would give the plaintiff his costs, but it does not apply where the plaintiff succeeds on all. [*Williams, J.*—That is, you say, the plaintiff here would have been in a better situation if he had failed partially, than he is now that he has succeeded entirely.] That is the result of the authorities. [*Williams, J.*—Sect. 5 says, "If a verdict shall be found upon any issue in the said cause for the plaintiff, costs shall also be given in like manner." What does "costs" mean?] The costs of that issue. [*Williams, J.*—Why, then, may you not ascertain how each issue is found, and award the costs accordingly—to the plain-

tiff, the costs of those on which he succeeds; to the defendant, the costs of those on which *he* succeeds?] The latter words of the 5th section can only apply to issues in fact; and then *Richmond v. Johnson* decides, that if the plaintiff succeeds on all, the statute does not apply. [Williams, J. — If the plaintiff is entitled to judgment on the whole record, as in *Richmond v. Johnson*, he gets his costs without the aid of the statute of Anne. But if the defendant obtains judgment on the whole record, as here, the plaintiff is not entitled to the costs of those issues on which he succeeds, unless the statute of Anne applies. Therefore, there is an obvious distinction between the two cases.]

Willes, in support of the rule. In the other courts, no doubt, there is a conflict of authorities on this point, but the decisions in this Court have been consistent. Best, C. J., in *Newton v. Cowie*, 4 Bing. 241, says, "If the decisions are contradictory, we are to consider the reasons given for them by those who pronounced them. If our predecessors have given no reasons for their judgment, or the reasons given for conflicting judgments are equally unsatisfactory, we are to put that construction on the statutes which our own unfettered judgment induces us to think the legislature intended should be put on them." That rule of construction is applicable here, and it will be found that the reasons given for the decisions in *Partridge v. Gardner*, and *Howell v. Rodbard*, are unsatisfactory. It was there said, that *Richmond v. Johnson* had put a construction upon the 5th section of the statute of Anne which had been universally adopted, until the Court of Queen's Bench disregarded it in *Bird v. Higginson*. But in *Richmond v. Johnson*, except for the certificate of the Judge under the statute of Elizabeth, the plaintiff would have been entitled to his costs under the statute of Gloucester, he having obtained judgment on the whole record; to those facts the Court said the statute of Anne had no reference. That decision, which the plaintiff does not dispute, has manifestly no application to a case where the plaintiff cannot get costs but for the statute of Anne; that is, where the defendant has obtained judgment on the whole record, as in *Partridge v. Gardner*, and as in the present case. Suppose, instead of fifteen issues of fact on which the plaintiff succeeds, and one of law on which the defendant succeeds, there had been fifteen issues of law on which the plaintiff succeeded, and one issue of fact on which the defendant succeeded; then, according to *Partridge v. Gardner*, the plaintiff, although he would not be entitled to the costs of the fifteen issues of fact in the former case, would be entitled to the costs of the fifteen issues of law in the latter. Surely the statute did not mean that this absurd consequence should follow. [Talfourd, J. — *Richmond v. Johnson* only decides that the certificate under the statute of Elizabeth overrides the whole record.]

JERVIS, C. J. I think this rule should be made absolute. If the case were free from authority, it might be necessary to refer to the statute; but without doing that, I think that, so far as this Court is concerned, we should be well justified in holding ourselves bound by

the deliberate decision in *Clarke v. Allatt*, even though the effect would be indirectly to overrule the decisions of the Court of Exchequer. I certainly think that Court would not have construed the statute in such a manner as to overrule not only the case of *Bird v. Higginson* in the Court of Queen's Bench, and the older authorities in this Court, but also a recent case in this Court, had they been aware of that case, (*Clarke v. Allatt*), which does not appear to have been referred to by them. But in order to show that our present decision is correct, it may be necessary to look to the authorities on the subject, and also to the statute. In *Yates v. Gun*, the earliest case on this subject, this Court determined that the plaintiff was entitled to costs under circumstances like the present; and a like decision was come to in *Clarke v. Allatt*. So far, therefore, as this Court is concerned, their decisions, as Mr. Willes has well observed, are uniform. The case of *Yates v. Gun* was followed by *Bird v. Higginson*, in which the Court of Queen's Bench thought a previous decision of their own Court (*Cooke v. Sayer*) was unsatisfactory, and overruled it. I was concerned in *Bird v. Higginson*, and I know that the question was very fully considered by the Judges of the Court of Queen's Bench, and their judgment prepared with great care by Littledale, J. In that case the Court treated *Richmond v. Johnson*, and *Howard v. Cheshire*, as inapplicable to this question. Those cases decided, that where the plaintiff was entitled to judgment on the whole record, but by reason of collateral matters the judgment did not carry costs, he could not get his costs under the statute of Anne; and I think, on consideration, it will be found that those cases do not bear upon the present question, as the Court of Exchequer thought they did. The Court of Exchequer thought themselves bound by previous decisions to adopt a different view from that taken in *Bird v. Higginson*, and to hold, that where a plaintiff obtains a verdict on every issue of fact in the cause, but is not entitled to judgment on the whole record, he is not entitled to the costs of those issues, although he would be entitled if the defendant had succeeded on any one of those issues. In answer to that, I think my brother Williams, in the course of the argument, suggested the true construction of the statute. If it only applies to cases where the plaintiff does not succeed on all the issues, it must be because, if he succeeds upon all, he gets his costs without its aid under the statute of Gloucester. Now, here the plaintiff does not get his costs under the statute of Gloucester; but in *Richmond v. Johnson* he would have got them under that statute but for the certificate, as he obtained judgment on all the issues. That, therefore, being a case to which the statute of Anne, which only applies where the plaintiff, independently of it, could not get his costs, was wholly inapplicable, is not in point as regards the facts either of *Partridge v. Gardner* or of this case. This view is quite consistent with the construction of the statute. The 4th section enabling the defendant to plead several matters, the 5th says, "If such matter shall, upon demurrer joined, be judged insufficient, the costs shall be given at the discretion of the Court; or if a verdict shall be found upon any issue for the plaintiff, costs shall also be given in like manner," &c. That I take to mean, if the defendant pleads immaterial matter, he must pay the costs of it, even

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though he gets judgment generally on the whole record. I think, therefore, that the construction of the statute well warrants the decisions in *Bird v. Higginson* and *Clarke v. Allatt*, and that *Partridge v. Gardner* and *Howell v. Rodbard* proceeded on a misconception of the authorities on which the Court relied. Both principle, then, and authority well warrant our present decision to make this rule absolute.

WILLIAMS, J. I am of the same opinion. I think the decision in *Bird v. Higginson*, which was fully considered, was consistent with good sense and propriety, and in accordance with the reasonable construction of the words of the statute; and it was deliberately acted upon by this Court in *Clarke v. Allatt*. But it appears that the Court of Exchequer, since the decision in *Clarke v. Allatt*, without having their attention drawn to it, have overruled *Bird v. Higginson*. I, for one, should not hesitate to abandon the view this Court took in *Clarke v. Allatt*, had the Court of Exchequer pointed out any fallacy by which the Court of Queen's Bench was misled in *Bird v. Higginson*, or any passage of the statute which had been overlooked. But they have not done so; and I can see no reason whatever to induce me to depart from the authority in this Court.

TALFOURD, J. I am entirely of the same opinion. The suggestion of my brother Williams in the course of the argument convinces me that the words of the statute may be well satisfied by holding the plaintiff to be entitled to his costs in this case, where there has been double pleading, although he has not failed on any issue of fact. It is quite obvious that the conclusion to which the Court of Exchequer came was not contemplated by the legislature; and I think the construction they have put upon the statute leads to absurdity and injustice. With great respect for that Court, I think there is no reason why we should depart from the view this Court has already expressed upon this matter. — *Rule absolute*.

MUNDAY v. STUBBS.¹

November 16, 1850.

Trespass — Messenger in Bankruptcy — Demand of Warrant —
12 & 13 Vict. c. 106, s. 107.

A messenger of the Court of Bankruptcy, who takes the goods of a stranger, though in the *bona fide* belief that they are the goods of the bankrupt, which, by the warrant of the Court, he is directed to take, is not entitled to the protection of the 12 & 13 Vict. c. 106, s. 107, but is liable to an action of trespass, without there being any demand of the perusal of such warrant.

TRESPASS for breaking and entering the plaintiff's house, and taking the plaintiff's goods. Plea, not guilty by statute. At the trial, before

¹ 20 Law J. Rep. (N. S.) C. P. 59. 14 Jur. 1027.

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the late Chief Justice, at the Middlesex sittings, after last term, the plaintiff failed to show an interest in the house, the same being the house of one Bartlett, who had become a bankrupt; but the plaintiff claimed the goods on the premises under a bill of sale from the bankrupt. The defendant, who was a messenger of the Court of Bankruptcy, entered the house, and seized the goods, *bona fide* believing them to be the property of the bankrupt. The defendant acted under a warrant from the Bankruptcy Court, directing him to enter the house of the bankrupt, and any other place where his goods were, or were suspected to be, and to seize and take the goods of the bankrupt. No demand having been made by the plaintiff to see the warrant under which the defendant acted, it was, amongst other things, contended that the plaintiff ought to be nonsuited. The learned judge refused to nonsuit, and a verdict was found for the plaintiff, damages 70*l.*, with leave to the defendant to move the court for a rule to enter a nonsuit, or a verdict for the defendant. In the early part of this term a rule *nisi* accordingly was obtained on this point,¹ against which cause was now shown by

Byles, Serj., and *Miller*, for the plaintiff. It is submitted, that, if the messenger seizes goods of another person, though believing them to be the property of the bankrupt, for the seizing of whose goods he has a warrant, it is not necessary that there should be any demand and perusal of such warrant. The 107th section of the 12 & 13 Vict. c. 106, which relates to this matter, enacts, "that no action shall be brought against any messenger, or his assistants, or other person appointed by the court, for any thing done in obedience to any warrant of the court, unless demand of the perusal and copy of such warrant hath been made." That differs from the 159th section of that act, which limits the bringing of actions to three months after the fact committed, "against a person for any thing done in pursuance of the act." In the latter case the party would be entitled to the protection of the act, where he has acted in the *bona fide* belief that what he has done was in pursuance of the act, although, strictly, what he has done was not what the statute authorized. But, with regard to the 107th section, the protection given by it to the messenger is only where he has acted "in obedience to the warrant," which he did not do when he took the goods of the plaintiff, the warrant ordering him only to take the goods of the bankrupt. If the warrant has been issued by a person who has no jurisdiction to do so, the messenger, though acting strictly in obedience to it, would need protection; and it is for such a case the act protects him; but it was never intended to protect him where he has not strictly obeyed the warrant. The 24 Geo. 2, c. 44, s. 1, is analogous, and under that it has been held, that a constable is not protected unless he has acted strictly in obedience to the warrant, though a magistrate is protected in all cases where he acts in execu-

¹ The rule was also applied for on the ground that the trespass as to the house had failed; but the Court thought the trespasses were divisible, and refused a rule on that point.

tion of his office. *Money v. Leach*, 3 Burr. 1742; *Prestige v. Woodman*, 1 B. & Cr. 12; *Smith v. Wiltshire*, 5 Moore, 322. The object of sect. 107 is to make the petitioning creditor a defendant to any such action, where the messenger has obeyed the warrant; but here, if the action were to be brought against the petitioning creditor, he would have said that he never authorized the messenger to seize the goods of the plaintiff, but the goods of the bankrupt; and the plaintiff would be without remedy, if he could not sue the messenger.

James, Q. C., in support of the rule. It is conceded by the other side that the messenger acted *bona fide*, and that he believed the property he took was the property of the bankrupt. If, then, he be not protected from an action, how can he ever be protected in the execution of warrants? The same rule as to protection applies, as laid down in the cases in which a party has been held entitled to notice before action; where he has had reason to believe that he has been acting in pursuance of the act. [*Talfourd*, J. — Who do you say should be liable for the trespass? The petitioning creditor; he it is who puts the messenger in motion, and who substantially is the party causing the goods to be taken. The messenger acts merely ministerially, and it was never intended that he should be held answerable in actions of this nature. [*Jervis*, C. J. — Suppose a warrant was issued by the petitioning creditor, directing the officer to take A. B., do you say that the petitioning creditor would be liable, if, under such a warrant, the officer were to take C. D.?] It would be a question for the jury, whether he acted *bona fide*, and in the reasonable belief that in taking C. D. he was acting in obedience to the warrant. [*Maule*, J. — Is reasonable belief any thing else than evidence of the acting being *bona fide*?] Yes; it is submitted that they are both requisite. It was so held in *Kine v. Evershed*, 10 Q. B. 143; 11 Jur. 673, where, to entitle the defendant to notice of action under the Malicious Injuries Act, it was held not enough that he had acted *bona fide*, unless he had reasonable belief also that he was acting under the authority of the owner. [*Panton v. Williams*, 2 Q. B. 169; s. c. 16 Law J. Rep. (N. S.) Q. B. 271, was also cited.] What is acting in obedience to a warrant? Does it mean strict obedience? [*Jervis*, C. J. — It must mean such obedience as would make the petitioning creditor liable for what is done under it.] It is submitted, that, in this case, the 107th section substituted the petitioning creditor as defendant, for the messenger.

JERVIS, C. J. I am of opinion that this rule ought to be discharged. If the question had arisen on the 159th section of the act, — that is to say, whether the action had been commenced before the time limited by that section had expired, — then the authorities cited by Mr. James would apply; but, under this 107th section, it is very different. The language of that section sufficiently explains it; it shows, that if the action be brought without a demand of the warrant, when it is required that such demand should be made, the petitioning creditor is to be made a defendant. It is certainly plain from it, that the act only meant to give the messenger protection, when he has acted in

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obedience to the warrant, and the petitioning creditor, who caused the warrant to be issued, is liable. It is manifest, that, if the messenger, professing to act in obedience to the warrant, were to arrest a wrong person, the petitioning creditor would not be liable. Under the 24 Geo. 2, c. 44, which contains a similar provision to the present act, the constable is not protected unless he acts in obedience to the warrant; and it would be contrary to the uniform class of cases on that statute, if the messenger, in such a case as this, were to be held justified.

MAULE, J. I think that the strict and literal construction of the words of this act leads to the conclusion that the present case is not one to which the protection given by the act applies. If it were to apply, the defendant's counsel must admit that there would be a bar in a case in which no analogous statute has given a defence. That would be contrary to both the statute and the probable intention of the legislature, which meant only that when the messenger has done no more than the warrant orders him, he is not to be liable for any want of jurisdiction in issuing the warrant, but that that responsibility should be cast on the petitioning creditor. And it is but reasonable and fair that the petitioning creditor should, in such case, be responsible, and not the person who is only a ministerial officer acting on his behalf. That is not so here; and I think, therefore, with my Lord, that this rule should be discharged.

WILLIAMS, J. I am of the same opinion. Mr. James has not pointed out any distinction between the language of this act and that of the 24 Geo. 2, c. 44. It is sufficient, therefore, to say, that this point is one which has long ago been settled by numerous authorities.

TALFOURD, J. The case of *Parton v. Williams*, 3 B. & Al. 330, which was decided on the 24 Geo. 2, c. 44, notices the distinction between the different sections, pointed out by my Lord. There a constable, under a warrant to take the goods of A. B., had taken those of C. D., and it was objected that the action could not be brought, because it had not been brought within the time limited by the act, and also because there had been no previous demand of a copy of the warrant. The Court granted a rule upon the first point, but refused it on the latter, because the constable had not acted in obedience to the warrant. — *Rule discharged.*

Owen v. Van Uster.

OWEN v. VAN USTER.¹

November 11, 1850.

Bill of Exchange — Bill drawn on several, accepted by one — Liability — Company — Evidence of Membership.

A person who accepts a bill addressed to himself and others is individually liable.

It is sufficient evidence to prove a person to be a member of a trading company, that he and others had agreed to form a company, and that business had been carried on upon the footing of the agreement.

Where a bill was addressed to a mining company, and accepted by the defendant as manager, and it was shown that he and three others had agreed to form the company, and that the mine had been worked on the footing of that agreement: —

Held, that the defendant was individually liable on the bill as a member of the company.

The case of *Vice v. Lady Anson*, 7 B. & C. 409; s. c. 6 Law J. Rep. K. B. 24, commented upon.

ASSUMPSIT on a bill of exchange.

The declaration stated that the plaintiff, on the 26th of April, 1850, made his bill and directed it to the defendant, and required the defendant to pay to the order of the plaintiff, in London, 100*l.*, three months after date, and that the defendant accepted the said bill, &c.

Plea — that the defendant did not accept.

At the trial, before Cresswell, J., at the Sittings at Guildhall, in Michaelmas term, 1850, the bill was produced. It was directed to "The Allty Crib Mining Company, near Talybout, Aberystwith," and was accepted "For the Allty Crib Mining Company, payable at Messrs. Williams, Deacon, & Co.'s. W. T. Van Uster, manager."

On the part of the defendant, it was submitted that this acceptance did not bind the defendant, because he had no authority to accept, and the case of *Leadbitter v. Farrow*, 5 M. & S. 345, was cited. A witness was called to prove that the defendant was a shareholder in the company, and he stated that the defendant and three other persons arranged that there should be a company consisting of those four, and the mine was afterwards worked on that footing.

The learned Judge asked *Byles, Serj.*, for the plaintiff, whether there was not a variance, and whether he would not wish to amend; and *Byles* having elected not to amend, the Judge told the jury that the only question for them was, whether the defendant had accepted or not. The jury found a verdict for the plaintiff, with 101*l.* 9*s.* damages.

Kingdon now, on behalf of the defendant, moved for a rule nisi for a new trial, on the grounds of misdirection and that the verdict was against evidence. It is submitted, that the defendant was not liable individually or as a shareholder. The acceptance was not according to the tenor of the bill. The action ought to have been brought

¹ 20 Law J. Rep. (N. S.) C. P. 61.

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against the defendant for misrepresenting that he had authority to accept the bill. There is no case precisely in point; but in *Polhill v. Waller*, 3 B. & Ad. 114; s. c. 1 Law J. Rep. (N. S.) K. B. 92, an action was brought by the indorsee against the acceptor of a bill, for falsely representing that he had authority to accept by procuration, and was held maintainable, although there was no fraud in fact. Lord Tenterden, in giving judgment in that case, says that no one can be liable as *acceptor* but the person to whom the bill is addressed, unless he be an acceptor for honor. *Davis v. Clarke*, 7 Q. B. Rep. 16; s. c. 13 Law J. Rep. (N. S.) Q. B. 305, confirms the principle laid down in *Polhill v. Waller*. Ex parte *Buckley*, 14 Mee. & W. 469; s. c. 14 Law J. Rep. (N. S.) Exch. 341; *Wilson v. Barthrop*, 2 Ibid. 863; s. c. 6 Law J. Rep. (N. S.) Exch. 251; and *Jenkins v. Hutchinson*, 18 Law J. Rep. (N. S.) Q. B. 274, are authorities to show that the defendant is not liable.

[MAULE, J. You say that the defendant signs for four persons, and that in an action on the bill he can plead that he did not accept, and, under that plea, can show that he had no authority from the others. Suppose each of the four had accepted, and an action was brought against one, could that one say that he did not accept?]

The defendant purports to accept by procuration, and does not represent himself to be a member. There are many cases which show that when a party takes bills accepted by procuration, he has notice to make inquiries as to the authority of the acceptors.

The other point in the case is, that there was not sufficient evidence to show that the defendant was a shareholder in the company. It was only shown that an agreement had been entered into to form a company, but not that the company had been formed. The case of *Vice v. Lady Anson*, 7 B. & C. 409; s. c. 6 Law J. Rep. K. B. 24, shows that this kind of evidence is not sufficient to make the defendant liable as a shareholder. There it was held, that although the defendant had paid money for shares in a mine, and received a certificate that she was proprietor of them, and had acknowledged herself to be a proprietor, yet, as there had been no assignment to her of any interest in the mine, she was not liable as a shareholder.

[MAULE, J. This is not a joint-stock company.]

[TALFOURD, J. The term "shareholder" is inapplicable here.]

JERVIS, C. J. I am of opinion that there should be no rule in this case. The action is brought on a bill of exchange, addressed to the Allty Crib Mining Company, and accepted by the defendant on their behalf, in his own name, as the London manager. The form of acceptance being by procuration, the defendant could not be charged with a personal responsibility on that account. The question then arises, whether the defendant is liable under the acceptance as a member of the company. The first question is, whether there was any evidence at the trial that the defendant was a member of the company; for, if there was not, the objection taken at the trial ought to prevail. The decision in the case of *Vice v. Lady Anson*, which has been cited, went on the ground that the interest proved to exist was proved

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by means of an admission made under an error. Here, on the contrary, it is proved, from the terms of the acceptance, that the company does exist, and that it has been formed and worked. Therefore, it was for the jury to say whether the defendant was a member of the firm. Then the question arises, whether, on a bill addressed to four and accepted by one, that one person is liable. Now, it seems from the recent authorities, — although it was doubted at one time whether a person accepting a bill on a false assumption of authority was personally liable on the bill, — that the acceptance of one, when a bill is addressed to several, is sufficient to bind that one.

MAULE, J. I am of the same opinion. The cases have been fully looked into, and their effect pointed out. Some of the cases referred to are express authorities to show that a bill, being drawn upon four, and accepted by one of the four, he is liable upon it. I do not think that the bill is vitiated by the defendant's misrepresentation. It may give the plaintiff another kind of action, if he choose to sue the defendant for representing that he had authority; but I do not think it deprives him of his action, as if the acceptance was a simple acceptance in his own name. As to the evidence of his being a shareholder, it was proved that it was agreed by the defendant and three others that they should be shareholders, and that the mine should be worked. There is ample evidence to show that the defendant and the three others were jointly engaged in working the mine. If so, that fixes the defendant as one of the persons for whose benefit he assumed to accept the bill. In the case of *Vice v. Lady Anson*, the defendant was held not liable, because she had no legal estate in the mine. The question there arose in this way: in order to make Lady Anson liable, it was necessary to prove that she was the person in whose behalf the expenses, which were the subject of the action, had been incurred. The proof relied upon was, that Lady Anson had said that she was a shareholder; but that was disposed of by showing that she made that admission under the false impression that she had a legal interest in the mine. There was no other connection between her and the mine, than the supposed legal interest which she had in the mine. That case by no means decides that persons cannot be shareholders in a mine, except by having a legal interest in it. It only shows, that if there be no other way of proving a person to be a shareholder, than by proving that he had a legal interest, that interest must be properly proved. In this case it was not necessary to prove so remote a matter as that the defendant had a legal interest in the mine, for it was proved that he and others worked the mine. This rule must, therefore, be refused.

WILLIAMS, J. I am of the same opinion. There was ample evidence in the case to show that the defendant was a member of the company, and, therefore, one of those to whom the bill was addressed.

TALFOURD, J., concurred. — *Rule refused.*

Hooper v. Woolmer.

HOOPER v. WOOLMER.¹

November 11, 1850.

Pleading — Agreement — Request — Immateriality — Proportion of Rates and Amount.

The plaintiff declared on an agreement by which he let to the defendant two rooms in a house, and the defendant promised, besides the rent, to pay the proportion of the rates to be assessed. The declaration averred that rates were assessed, that the plaintiff paid them, and that the proper and reasonable proportion to be paid by the defendant was a certain proportion, to wit, one third part, amounting, to wit, to 50*l.*, of which the defendant had notice and was requested to pay, &c.

A plea to this declaration denying the request to pay was held bad, on demurrer, as raising an immaterial issue.

Also, a special traverse, stating that the proper and reasonable proportion was a certain proportion amounting to 12*l.* 10*s.* and no more; *obsequè hoc* that the proper and reasonable proportion was a certain proportion, to wit, 50*l.*, was held bad on demurrer, for attempting to put in issue the immaterial allegation, that 50*l.* was the amount of the reasonable proportion.

ASSUMPSIT. The first count of the declaration stated that a certain agreement was made by and between the plaintiff and the defendant, in the words following:—

"18th of August, 1847. Memorandum of the terms on which Mr. S. Hooper agrees to let, and Mr. S. F. Woolmer to take, the ground-floor, consisting of two rooms, in the messuage of the said S. Hooper, &c., at, &c.; and the said S. F. Woolmer agrees to pay the proportion of rates, taxes and assessments, whether parliamentary, parochial, or otherwise, (except landlord's property-tax,) which now are or hereafter may be assessed on the said premises so taken by the said S. F. Woolmer," &c.

After alleging mutual promises, the count stated that whilst the defendant was tenant of the said premises, divers rates, taxes, and assessments, other than landlord's property-tax, amounting to a large sum of money, to wit, 250*l.*, were assessed on the said messuage in the agreement mentioned, whereof the said demised premises were and are parcel as aforesaid; that the said rates, taxes, &c., became on a certain day, to wit, the 2d of July, due and payable, and were then respectively paid by the plaintiff; and that the proper and reasonable proportion of the said last-mentioned rates, taxes, &c., to be paid by the defendant, in respect of the said demised premises, according to the form and effect of the said agreement, was a certain proportion thereof, to wit, one third part thereof, amounting, to wit, to the sum of 50*l.*, of all which the defendant, before the commencement of the suit, had notice, and was then requested by the plaintiff to pay the last-mentioned sum of money.

Pleas, first, as to 12*l.* 10*s.* parcel of the 50*l.* tender. Second, that the defendant was not requested to pay *modo et forma*. Fourth, as to the residue of the 50*l.*, that the proper and reasonable proportion of the said rates, taxes, &c., to be paid by the defendant in respect of the said demised premises, was a certain proportion, amounting to

the sum of 12*l.* 10*s.*, and no more; *absque hoc*, that the said proper and reasonable proportion of the said rates, taxes, &c., was a certain proportion or part thereof, to wit, the sum of 50*l.* *modo et forma*.

Demurrer to the second plea, on the ground of its attempting to raise an immaterial issue. Demurrer to the fourth plea, on the grounds of uncertainty and multifariousness, it being uncertain whether the plea means to traverse the allegation that the proportion of one third was the proper one, or that the rates amounted to 50*l.*, or to put in issue both the proportion and the amount.

Couch, in support of the demurrer. The second plea is bad, because it seeks to put in issue the immaterial averment in the declaration of a request. The declaration alleges the assessment and the payment of the rates, and that the defendant had notice; and there was no necessity for adding a special request. The duty of the defendant to pay arose upon the payment by the plaintiff. The question when a special request is material and must be averred, is decided in *Wallis v. Scott*, 1 Str. 88, and *Hill v. Wade*, Cro. Jac. 523.

[MAULE, J. The defendant here, in consideration of the occupation of the premises, promises to pay rent, and rates to be afterwards ascertained. No other request for the payment of the rates is necessary, than for the payment of the rent.]

As to the fourth plea, it is a special traverse, which evidently puts in issue not only that one third is the proper proportion of the rates which the defendant ought to pay, but also that 50*l.* is the amount; and it is therefore clearly bad.

Needham, contra. As regards the fourth plea, the plaintiff uses several *videlicets* in the declaration, which are followed in the plea; and what the plaintiff means to aver, the defendant means to traverse. The plaintiff says that 50*l.* is the defendant's proportion; and the defendant says that 12*l.* 10*s.* is his proportion, *absque hoc*, that it is 50*l.*

[MAULE, J. The substance of the allegation in the declaration is this, "I, the plaintiff, paid the rates and taxes, and gave you notice of the fact, and of the amount of your proportion, which was, to wit, 50*l.*" The sum there is not material. If the facts were, that the plaintiff paid the rates, and told the defendant that his share was 12*l.* 10*s.*, those facts would prove both the declaration and the plea, which therefore shows that the plea is bad.]

The defendant could not have put the proportion in issue otherwise than he has done.

[MAULE, J. Might he not have done it by traversing the notice? Does not the allegation "of *all* which he had notice," include the proportion?]

As to the second plea, — where notice is necessary, as it always is in the case of an undertaking to pay another person's debt, it is necessary to aver a request. Such is the rule laid down in *Birks v. Trippet*, 1 Wms. Saund. 32. Then, the declaration is insufficient, for it alleges an undertaking to pay a proportion of rates assessed on the premises demised, and there is no allegation of any assessment on the premises demised to the defendant.

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[MAULE, J. If that averment be necessary, it must be taken to be contained in the declaration after plea pleaded.]

JERVIS, C. J. I am of opinion that the plaintiff is entitled to judgment. With respect to the second plea, the demurrer raises the question, whether, under the contract stated in the declaration, there ought to have been a request made by the plaintiff to the defendant to pay the rates, before action brought. The state of facts shows that there was a letting of the premises at a certain rent *plus* the proportion of the rates and taxes. The record shows that the rates were assessed on the whole premises, and a proportion calculated on the whole. There was then a primary liability on the defendant to pay the proportion of the rates due, on receiving notice from the plaintiff. As to the fourth plea also, I think that the plaintiff is entitled to judgment. That plea traverses the actual amount of the proportion of the rates, namely, the 50*l*., which, I think, is not material. On both points, therefore, the judgment must be for the plaintiff.

MAULE, J. I am of the same opinion. The declaration states an agreement to pay the rates, an assessment, and a notice of that, and of the proportion to be paid by the defendant. I think that shows, without any allegation of a request, a liability on the part of the defendant to pay the plaintiff. It shows that a debt was due from the defendant to the plaintiff, in which case no demand was necessary, unless provided for by the agreement. It is like the case of goods sold and delivered, where no request to pay is necessary, unless there be an agreement not to pay until a certain time after demand. This debt seems to me, under the circumstances of the case, to be payable without a request. The second plea, therefore, puts in issue an immaterial allegation, and is, consequently, bad on demurrer. As to the fourth plea, it is, perhaps, difficult to ascertain its effect. It is said that it puts in issue the precise amount of the rates to be paid by the defendant; and I do not think that the plaintiff is bound to prove the precise amount. The plaintiff says, that the defendant had notice of the amount due by him, and then states that it was so much. I am not certain whether it is material to state the amount of the defendant's share, because, if he had notice of the amount of the whole, he had equal means with the plaintiff of discovering his proportion and the amount of it. If the defendant sought to put the question of proportion in issue, he might have done it by controverting the notice. I think, therefore, the fourth plea is bad, and the judgment should be for the plaintiff.

WILLIAMS, J. If the defendant had thought it inconvenient to be liable to pay without a request, he should have made a stipulation to that effect in the agreement. I do not think we are called upon to import any such thing into the agreement.

TALFOURD, J., concurred. — *Judgment for the plaintiff.*

Aylward v. Garrett.

AYLWARD v. GARRETT.¹

November 25, 1850.

Practice — Nul tiel Record — Dies datus Clause — Judgment — Continuance — Reg. Gen., H. T., 4 Will. 4, II. r. 2.

To a plea of *nul tiel* record the plaintiff replied *tiel* record, but omitted to give the defendant a day to bring in the record; the Court refused to give judgment.

Semble, the *dies datus* clause is not a continuance.

DEBT upon a judgment recovered in this Court. Plea, *nul tiel* record. Replication, that there is such record, &c., "and this the plaintiff is ready to verify by the said record, where and in such manner as the Justices here shall order, direct, and appoint; and he prays that the said record may be seen and inspected by the said Justices here."

Bramwell, (November 25,) moved for judgment. The plaintiff has duly obtained and served a rule for judgment, and the record of the judgment is in Court, but the Master objects that no day is named on the present record for hearing judgment. The *dies datus* clause that follows the prayer of inspection, in the common form of replication, is spoken by the Court, and not by either of the parties to the record, and must, therefore, be in the nature of a continuance; but, as continuances are abolished by the Reg. Gen., H. T., 4 Will. 4, II. r. 2, that clause is properly omitted, and has in this case been omitted advisedly. [*Jervis*, C. J. — Suppose an action for goods sold and delivered, plea judgment recovered, replication *nul tiel* record, must not there be a day fixed for bringing in the record?] There must be a day, in fact, but it need not be entered upon the record. [*Jervis*, C. J., referred to the practice as stated in 1 Wms. Saund. 92, note 3. If the pleadings were *ore tenus*, the plaintiff would say here that he had recovered a judgment; the defendant would answer, "No, you have not;" upon which the Court would say, "Bring the record into Court on Monday." Is it the duty of the Court or of the plaintiff to put that upon the record?] It is not the duty of either, as continuances have been abolished. [*Jervis*, C. J. — The Master has handed to me a manuscript case, which shows what has been the practice of this Court since the rule which abolished continuances; it is as follows: "Upon reading the record of the issues of *nul tiel* record in this cause, and the affidavit of J. L., and on hearing counsel on behalf of the plaintiff, it is ordered that the day for the production by the defendant of the record of the writ on the said issue mentioned be continued to Monday, the 31st January instant, and that the record of the said issue be amended accordingly. The affidavit to ground this application stated a summons pending to set aside the issue as a reason for the non-production on the day first given." *Williams*, J. — The *dies datus* clause is not a continuance.] The issue is complete

Doe d. Burrell v. Davis.

by the prayer of inspection, and the omission of that clause, at all events, is merely an irregularity of which the defendant may, if injured by it, take advantage hereafter. The plaintiff has failed to give him notice of trial, but the Court cannot now inquire whether such notice has been given to him, any more than a judge can in a cause at *Nisi Prius* which is regularly before him.

JERVIS, C. J. We are of opinion that we cannot give judgment upon this record in its present form. The practice, as laid down in Mr. Chitty's edition of Archbold's Practice, (838, 8th ed.,) shows that the *dies datus* clause is added by the last pleader; he says, "As this completes the pleadings, you may make up the issue, and deliver it, as in the ordinary cases." If that clause be a continuance it may be omitted, but we feel bound by the practice as stated; and it is clear that it is correctly stated, from the manuscript case which has been handed up to me by the Master. This is merely an experiment in opposition to the authorities on the point.

WILLIAMS and TALFOURD, JJ., concurred. — *Judgment refused.*

DOE, d. BURRELL v. DAVIS.¹

January 15 and 22, 1851.

Landlord and Tenant — Ejectment — Forfeiture — Covenant to repair — Fixtures.

The mere removal and sale by a tenant, during the term, of fixtures, which he does not immediately replace, but which can be replaced before the end of the term, is not in itself a breach of his covenant to repair and uphold the demised premises, and to deliver up the same at the end of the term, together with all things affixed thereto.

EJECTMENT to recover possession of stables, coach-houses, lofts, and lodging-rooms. The cause was tried, before Talfourd, J., at the Sittings for Middlesex after last Michaelmas term, when it appeared that the premises in question were demised by the lessor of the plaintiff to one Smith, by indenture dated the 20th March, 1843, for a term of 25 years, from the 25th December, 1842, at a yearly rent of 175*l.*, payable quarterly; the lessee covenanting that he, his executors, administrators, and assigns, should and would, at his and their own proper costs and charges, from time to time, and at all times thereafter, during the said term thereby granted, well and substantially repair, uphold, support, sustain, maintain, amend, and keep the said coach-houses, stables, lofts, lodging-rooms, and premises thereby demised, or intended so to be, with the appurtenances, and all additions

¹ 15 Jur. 155.

and improvements to be made thereto, in, by, and with all manner of needful and necessary reparations and amendments whatsoever, when, where, and so often as need or occasion should be or require, and leave or deliver up the same, and the peaceable and quiet possession thereof, unto the said Thomas Burrell, his executors, administrators, and assigns, at the end or other sooner determination of the demise, together with all improvements to be made thereto, and all locks, keys, bolts, bars, sash windows, shutters, marble and other chimney pieces, wainscots, partitions, racks, stalls, mangers, dressers, shelves, pipes, pumps, posts, pales and rails, and all other things fixed and fastened, or to be fixed and fastened, to or upon the said premises thereby demised, or any part thereof, without any let, trouble, or suit in law whatsoever. Proviso for reëntry on breach of any of the covenants therein contained. Soon after the granting of the lease, Smith, with the consent of Burrell, assigned the term to the defendant, who entered into possession of the premises, and in April, 1850, pulled down and removed a water closet, together with the leaden cistern pipes which supplied it, the kitchen range, dressers, shelves, and plate-racks in the kitchen, the fittings of the harness room, and the gas fittings in the lodging-rooms and stables, and sold the materials. The lessor of the plaintiff thereupon brought this action to recover possession, and contended that the above covenants were broken, and the lease forfeited. The jury, in answer to a question put to them by the learned Judge, found that all the articles mentioned were removable fixtures, and might be restored before the end of the term. The learned Judge then further directed them, that it was possible to remove fixtures, which might be restored during the term, in such a way as to amount to a non-repair, and the jury found that they were not removed in such a way as to amount to a non-repair; upon which the verdict was entered for the defendant, and leave was reserved to the lessor of the plaintiff to move to enter the verdict for him.

Byles, Serj., (January 15,) moved for a rule accordingly, and also for a new trial on the grounds of misdirection, and that the verdict was against the evidence. The removal of these fixtures was a breach of the first branch of the covenant, to *uphold* the demised premises, because fixtures are part and parcel of the premises, and pass by the demise, *quicquid solo plantatur solo cedit*. [*Jervis, C. J.*—Suppose the defendant objected to burning gas in his sitting-room, might he not remove the gas apparatus, and replace it at the expiration of the term? *Cresswell, J.*—Or suppose he altered the kitchen into a drawing-room, and the drawing-room into a kitchen, and removed the kitchen range and other fixtures from the one to the other, would the drawing-room, which was formerly the kitchen, be thereby put out of repair?] That would be waste; for the nature of the room and of the evidence would be altered, upon the same principle as if a tenant convert meadow into arable, or arable or pasture into wood, notwithstanding the alteration may improve the property. In *Pyott v. Lady St. John*, Cro. Jac. 329, it was held, fourthly, that the carrying away a shelf was a breach of a covenant to leave the

Doe d. Burrell v. Davis.

premises in repair. [Williams, J. — In those days the maxim of *quicquid solo plantatur solo cedit* was much more strictly applied than it is nowadays.] Where a lease contemplates improvements, the removal of fixtures, if found to be an improvement, may be no breach of a covenant like the present; but it is otherwise where the removal is an alteration for the worse, as in this case. In *Penry v. Brown*, 2 Stark. 403, a tenant, during the term, erected a veranda, the lower part of which was attached to posts fixed in the ground. Abbott, J., held, that the tenant, by removing it, was guilty of a breach of his covenant to keep and yield up the premises in good repair. [Cresswell, J. — It does not appear, from the report, that the veranda was removed and the action brought before the expiration of the term.] — The defendant has also been guilty of a breach of the second branch of the covenant, to deliver up the premises and fixtures at the end or sooner determination of the term. If the end of the term means the time when an entry is made, an entry is admitted by the consent rule, and the term ended then, and the fixtures were not then upon the premises; but if the end is to be the termination of the twenty-five years, the covenant is broken so soon as the defendant has put himself in a position not to be able to restore the removed fixtures; he is bound not to suffer any interval to elapse during which the premises are out of repair; the defendant here has sold the fixtures. In *Ford v. Tiley*, 6 B. & Cr. 325, the defendant had agreed to grant at some future time a lease of certain premises to the plaintiff, and he was held liable for a breach of that agreement, upon proof that he had, by granting a lease to another person, put it out of his power to perform the agreement. [Williams, J. — But the jury here have found that the fixtures might be replaced before the end of the term.] So it was said in *Ford v. Tiley*, that the lease granted might be surrendered or forfeited, so that the defendant might be in a condition to perform his contract with the plaintiff before the day for performing it arrived. [Maule, J. — The cases cited by the Court in their judgment were not cases of covenant. There may, perhaps, be a distinction between cases of contract or condition and cases of covenant.] In *Short v. Stone*, 15 Law J. Rep. (N. S.) Q. B. 143; 8 Q. B. 358, it was held, that the marriage of the defendant with another woman was a breach of his contract to marry the plaintiff, because he had put it out of his power to fulfil it. So in *Bowdell v. Parsons*, 10 East, 359, which was an action for the breach of a contract to deliver hay on request, an allegation that the defendant had sold and disposed of it to other persons, was held a sufficient breach of the contract, without alleging any request to deliver it; yet the defendant in that case might possibly have become repossessed of the hay, so as to have been ready to deliver it to the plaintiff when requested so to do. The verdict, also, was against the evidence. [Jervis, C. J. — As to that, you can bring another ejectment.] — *Curr. adv. vult.*

The judgment of the Court was, on the 22d January, delivered by

JERVIS, C. J. We have taken the opportunity of speaking to my brother Talfourd in this case, and his Lordship certifies that he is not dissatisfied with the verdict. That leaves the other two points which were raised on the discussion for the rule. He further reports that the whole of the articles, the subject matter of his decision, were treated at the trial in the same class as fixtures. The jury found that the fixtures were removable, and might be restored before the end of the term, and he was of opinion that that amounted to a verdict for the defendant; and in that view the Court concurs. But he further reports that he told the jury, that, notwithstanding that might be the case, still it was possible to remove fixtures, which might be restored during the term, in such a way as to amount to a non-repair; and, taking the point which was suggested by the learned counsel in the course of the rule, he left that to the jury, and they found that those fixtures were not removed in such a way as to amount to non-repair. We think, on that finding, he being satisfied, that there should be no rule, as we concur in the view he took of that matter. There will, therefore, be no rule. — *Rule refused.*

CASES

ARGUED AND DETERMINED

IN THE

COURT OF EXCHEQUER;

AND UPON

WRITS OF ERROR FROM THAT COURT TO THE EXCHEQUER CHAMBER.

COMMENCING MICHL. TERM, 14 VICT., A. D. 1850.

LYONS v. HYMAN.¹

November 4, 1850.

Costs — Certificate under the 43 Eliz. c. 6, s. 2 — Final Judgment.

A certificate to deprive the plaintiff of costs under the 43 Eliz. c. 6, s. 2, is inoperative if granted after final judgment, and it makes no difference that at the time of granting the certificate the amount of costs has not been inserted in the judgment book.

THIS was a rule calling upon the plaintiff to show cause why the judgment signed herein, the taxation of costs, and execution should not be set aside, or why the judgment should not be amended by striking out of it so much as related to the costs, or why all further proceedings should not be stayed on payment of 1s.

An action of debt to recover the sum of 97l. 10s. was tried, before the Chief Baron, on the 11th of May last, when the jury found a verdict for the plaintiff, damages 1s. On the 30th of May, the plaintiff taxed his costs and signed judgment, and, at half-past three in the afternoon of that day, issued execution. At a later period of the same day, the defendant took out a summons, before the Chief Baron, for the plaintiff to produce the record and *postea*, in order to have endorsed thereon a certificate to deprive the plaintiff of costs under the 43 Elizabeth, c. 6, s. 2. On the following day the certificate was endorsed as of the 30th of May, and the judgment, taxation, and all subsequent proceedings, were set aside. On the 3d. of June, the judgment was restored to the state in which it stood on the 30th of May. In the judgment book, as it stood at the close of the office on the 30th of May, no sum had been inserted as the amount of the costs, but a blank was left for the amount.

Watson and Hawkins showed cause. The certificate, not having been given until after final judgment, had no operation.

¹ 20 Law J. Rep. (n. s.) Exch. 1.

Millward v. Littlewood.

[PARKE, J. The Judge is not bound, under this statute, to certify at the time of trial; but if he certifies at all, he must do so before judgment.]

The object of the certificate of the Judge who tried the cause, is to enable the Judges to see what judgment they ought to pronounce. In *Foxall v. Banks*, 5 B. & Ald. 536, a certificate to deprive the plaintiff of costs was granted after the costs had been taxed; but in that case no judgment had been entered up. In *Davis v. Cole*, 6 Mee. & W. 624; s. c. 9 Law J. Rep. (N. S.) Exch. 258, a certificate was granted after judgment; but there the Judge, at the trial, had intimated his intention of granting a certificate, and would have granted it before judgment, but that the plaintiff obtained the record and signed judgment. They referred to *Whalley v. Williamson*, 5 Bing. N. C. 200; s. c. 8 Law J. Rep. (N. S.) C. P. 129, and *Hippesley v. Layng*, 4 B. & C. 863.

Bramwell and *Lush*, contra. The certificate being dated as of the 30th of May, and the judgment paper not having been filled up till afterwards, there was no judgment in existence for costs until after the certificate was granted.

[PARKE, B. In the cases which have been cited, of certificates given after judgment, there was a sort of irregularity. But in this case, after the taxation of costs and issuing of execution, the certificate came too late.]

In this case, something still remained to be done.

[PARKE, B. Nothing remained to be done in order to make the judgment regular.]

[POLLOCK, C. B. The power of certifying expires when the judgment is signed.]

The rule was afterwards made absolute for setting aside the judgment on terms. — *Rule absolute, accordingly.*

MILLWARD v. LITTLEWOOD.¹

November 6, 1850.

Marriage, Breach of Promise of — Arrest of Judgment — Sufficiency of Consideration — Validity of Promise of Marriage by a married Man.

In an action for breach of promise of marriage, the declaration alleged, that in consideration that the plaintiff had promised to marry the defendant, the defendant promised to marry her; that the plaintiff continued and still is unmarried, and, until the discovery of the defendant's marriage, was ready and willing to marry him; that after the defendant's promise, the plaintiff discovered that the defendant was and still is married, and that the plaintiff had not at the time of the defendant's promise any notice of the defendant's then marriage: —

¹ 20 Law J. Rep. (N. S.) Exch. 2

Millward v. Littlewood.

Held, on motion in arrest of judgment, that the declaration was good, and that the plaintiff's remaining unmarried was a sufficient consideration for the defendant's promise to marry her.

Dictum, per *Pollock*, C. B., that a promise by a married man to a woman to marry her after his wife's death is illegal.

The case of *Wild v. Harris*, 18 Law J. Rep. (N. S.) C. P. 297, affirmed.

ASSUMPSIT. The declaration stated that, in consideration that the plaintiff, being unmarried, had, at the defendant's request, promised to marry the defendant, the defendant promised the plaintiff to marry her. Averment, that the plaintiff hath always, from the time of the making of the defendant's promise for a reasonable time, to wit, until, &c., continued and still is unmarried, and was, from the time of the defendant's promise until the discovery hereinafter mentioned, ready and willing to marry the defendant; that, after the making of the defendant's promise, and before this suit, the plaintiff discovered that the defendant was then married, to wit, to one Hannah Littlewood, and that the defendant, at the time of his promise, and from thence hitherto hath been, and still is, married, and that the plaintiff had not, at the time of the defendant's then promise, any notice of the defendant's then marriage.

Pleas. First, *non assumpsit*; secondly, that the plaintiff had notice of the defendant's marriage.

At the trial, before Parke, B., at the last Chester Summer Assizes, the jury found a verdict for the plaintiff, damages 200*l*.

Herbert Jones, Serj., now moved to arrest the judgment. This case resembles *Wild v. Harris*, 18 Law J. Rep. (N. S.) C. P. 297. There the declaration averred that the defendant promised to marry her within a reasonable time; that the plaintiff remained unmarried, and was always ready to marry the defendant until she had notice that he was a married man. And the breach was, that the defendant had not married the plaintiff, but that, at the time of his promise, he was married, and still is married, to another woman. It was held that the defendant's promise was not unlawful, there being at the time of the promise a possibility of its performance, as the defendant's wife might have died within a reasonable time. That case resembles the present case in its circumstances, except that here the promise is to marry generally, and not, as in that case, within a reasonable time. It is submitted, however, that that case is not law. It is contrary to the spirit of the common law, and against policy and *bonos mores*. The language of the Court in *Holman v. Johnson*, Cowp. 343, is in point. The authority on which the Court of Common Pleas founded their judgment is to be found in Brooke's Abridg. "Conditions," fo. 152, pl. 119. But the position which is there laid down is founded on 40 Ass. p. 13, and is not correctly quoted. This appears from a note by Serj. Manning to the report of *Wild v. Harris*, 7 C. B. 999; s. c. 13 Jur. 961.

[PARKE, B. It is expressly stated in Fitz. Nat. Brev. p. 205, that such a condition is good.]

Bradley v. The London and North-western Railway Company.

POLLOCK, C. B. I think there is no ground for arresting the judgment, as there is no difference between this case and that of *Wild v. Harris*; and as no writ of error has been brought upon that case, there ought to be no rule. My brother Jones asks if a man may legally promise to marry a woman after the death of his wife? I think he may not, and on that point I differ from the authorities and agree with his view, and shall not entertain a different opinion unless compelled by high legal authority. I think it is inconsistent with that affection which ought to exist between married persons, that a man should, during his wife's life, promise to marry another woman after his wife's death. The present case differs somewhat from that which has been cited as to the statement of the plaintiff's discovery of the defendant's marriage. The defendant impliedly promised that there was no impediment to his performing his promise.

ALDERSON, B. I am of the same opinion. I have some difficulty in saying that this contract is not void as amounting to an engagement to marry within an indefinite time.

PARKE, B. I agree with the rest of the Court. The point has been decided by the Court of Common Pleas, in *Wild v. Harris*, and ample reasons were given for the decision. The promise given by the defendant was, that he was capable of marrying the plaintiff, and that promise he broke at the time of making it. The consideration for that promise was, that the plaintiff should remain unmarried. She would, therefore, have to wait until the defendant's wife should die or be divorced. I think, therefore, the Court of Common Pleas correct in their judgment. It is unnecessary to give any opinion whether a promise by a man to marry a woman after the death of his wife, is good, and I therefore say nothing on that point. Here there is a sufficient consideration for the defendant's promise, namely, that the plaintiff will remain unmarried; and if she discovered, on the day after the defendant's promise, that he was a married man, it would be sufficient. — *Rule refused.*

BRADLEY v. THE LONDON AND NORTH-WESTERN RAILWAY COMPANY.¹

November 4, 1850.

Railway — Lands Clauses Act, 8 & 9 Vict. c. 18, s. 25 — Award — Appointment of Arbitrator, Validity of.

An injury having been done to the premises of B. by the tunnel of a railway company, for which the company refused compensation, B. served them with a notice under the *Lands Clauses Act, 8 & 9 Vict. c. 18*, dated the 5th of December, requiring them to appoint an arbitrator on their behalf, and stating that it was his *intention* to appoint S. D. M. his arbitrator, and that if within fourteen days after the notice the company failed to appoint an arbitrator for them, he *would* appoint the said S. D. M. to act for both parties. The com-

¹ 20 Law J. Rep. (n. s.) Exch. 3.

Bradley v. The London and North-western Railway Company.

pany having refused to refer the matter to arbitration, B., on the 1st of January following, served them with a notice, which, after reciting that B. had appointed the said S. D. M. his arbitrator, stated that he then appointed the said S. D. M. to act as arbitrator on behalf of both parties. S. D. M. having awarded a sum of money to be paid by the company to B., a rule was obtained by B. for the company to pay the amount, and a cross-rule was obtained by the company to set aside the award on the ground stated in the rule, that the arbitrator had awarded respecting matters over which he had no jurisdiction.

Seem, first, that no valid appointment of an arbitrator to act for B. had been made by him, and that this objection to the award had been sufficiently pointed out by the rule, but the Court under the circumstances discharged both rules.

In this case a rule had been obtained by the North-western Railway Company, calling on one Bradley to show cause why a rule of the 7th of May should not be discharged, and why the award of one S. D. Martin, contained in the said rule, should not be set aside upon the ground as stated in the rule that the arbitrator had awarded respecting matters over which he had no jurisdiction. A cross-rule had also been obtained, calling on the London and North-western Railway Company to show cause why they should not pay to T. Bradley the sums of 900*l.* and 239*l.* 9*s.*, pursuant to a rule of the 7th of May, and to the award of one S. D. Martin.

The facts were as follows: The Huddersfield and Manchester Railway and Canal Company (since incorporated with the London and North-western Railway Company) carried a tunnel under the town of Huddersfield, so near to the premises of Thomas Bradley as to injure him, as he alleged, in the occupation thereof. In October, 1849, Mr. Bradley claimed compensation from the company, but the company refused to recognize his claim. On the 5th of December, he sent to the company a notice, in which, after specifying the injury sustained by him, he stated that he claimed compensation in pursuance of the statute in such case made and provided,¹ to the amount of 1250*l.* The notice then proceeded thus: "And further take notice, that unless you the said company are willing to pay to

¹ 8 & 9 Vict. c. 18, s. 25, enacts that "when any question of disputed compensation by this or the special act, or any act incorporated therewith authorized or required to be settled by arbitration, shall have arisen, then, unless both parties shall concur in the appointment of a single arbitrator, each party, on the request of the other party, shall nominate and appoint an arbitrator, to whom such dispute shall be referred; and every appointment of an arbitrator shall be made of the part of the promoters of the undertaking under the hands of the said promoters, or any two of them, or of their secretary or clerk, and on the part of any other party under the hand of such party, or if such party be a corporation aggregate under the common seal of such corporation; and such appointment shall be delivered to the arbitrator, and shall be deemed a submission to arbitration on the part of the party by whom the same shall be made; and after any such appointment shall have been made, neither party shall have power to revoke the same without the consent of the other, nor shall the death of either party operate as a revocation; and if for the space of fourteen days after any such dispute shall have arisen, and after a request in writing, in which shall be stated the matter so required to be referred to arbitration, shall have been served by the one party on the other party to appoint an arbitrator, such last-mentioned party fail to appoint such arbitrator, then upon such failure the party making the request, and having himself appointed an arbitrator, may appoint such arbitrator to act on behalf of both parties, and such arbitrator may proceed to hear and determine the matters which shall be in dispute, and in such case the award or determination of such single arbitrator shall be final."

me the said sum of 1250*l.*, and shall enter into a written agreement for that purpose within twenty-one days after the receipt by you, of this notice, then it is my desire that the amount of compensation to be paid to me by you, by reason of the premises, shall be settled by arbitration, according to the provision of the act or acts of Parliament, in that case made and provided. And if you the said company fail to pay me the said sum of 1250*l.*, or to enter into such written agreement as aforesaid, within the said twenty-one days, then and in that case I do hereby request and require you the said company to nominate and appoint an arbitrator to act on your behalf in the matter of the said arbitration. And further take notice, that it is *my intention* to nominate and appoint Samuel Dickenson Martin, of Leeds, in the county of York, surveyor and engineer, as my arbitrator in and concerning the matters aforesaid. And that, if for the space of fourteen days after the service of this notice and request, you the said company shall fail to nominate and appoint an arbitrator to act in your behalf as aforesaid, I, the said Thomas Bradley, *will* appoint the said S. D. Martin to act on behalf of both parties. Witness my hand this 5th day of December, 1849. Thomas Bradley, of Huddersfield, in the county of York."

The railway company having, on the 26th of December, refused to refer the matter to arbitration, Bradley served the company with a written document, dated the 1st of January, 1850; which document, after reciting the notice of the 5th of December, concluded in these terms: "And whereas a space of more than fourteen days and more than twenty-one days have long since elapsed after the said dispute as aforesaid had arisen, and after the said notice and request in writing had been made and served upon the said company as aforesaid; and the said company have, for the space of more than fourteen days and more than twenty-one days after the said dispute had arisen, and after the service of the said notice and request upon the said company as aforesaid, failed and refused to appoint any arbitrator in the said matters in dispute. And whereas I, the said Thomas Bradley, did by the said notice and request in writing appoint the said Samuel Dickenson Martin, my arbitrator in the matters in dispute as aforesaid. Now I, the said Thomas Bradley, in pursuance of the statute in such case made and provided, appoint the said Samuel Dickenson Martin to act as arbitrator on behalf of both parties in the said matters in dispute. Dated the 1st day of February, A. D. 1850. Thomas Bradley."

The arbitrator, accordingly, made appointments for proceeding with the reference, which was attended, on the 23d and 24th of January, by Bradley and his attorney, and by the attorney on behalf of the company, under protest, who submitted to the arbitrator that the damages claimed were not recoverable under the Lands Clauses Act, and that the present mode of proceeding was not the right mode of recovering damages. The company also delivered a written notice to Bradley, to the effect, amongst other things, that his notices were informal and invalid, and that the company would treat all proceedings under them as invalid and ineffectual. On the 26th of

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March, the arbitrator in his award, which recited the previous proceedings, including the two notices, awarded to Bradley the sum of 900*l.* as compensation, and 239*l.* 9*s.* as costs.

Hoggins and *Hugh Hill* showed cause, on behalf of the claimant Bradley, against the former rule, and appeared in support of the latter. First, the railway company have not pointed out their objection to the award in sufficiently specific terms.

[POLLOCK, C. B. The ground of the want of jurisdiction is stated, although the reason of the arbitrator having no jurisdiction is not set forth. Besides, the award distinctly recites this matter.]

Watson, contra. The objection in this case is, that the claimant Bradley did not make a valid and actual appointment of an arbitrator. He states, in his notice of the 5th of December, that it is his *intention* to appoint Martin as arbitrator.

[ALDERSON, B. It seems that they are to be two appointments.]

It sufficiently appears from the affidavits that Bradley appointed an arbitrator on his behalf, in compliance with the requisition of the statute.

[PARKE, B. The ground of requiring an actual appointment of an arbitrator is that the other side may consider whether they acquiesce in that appointment. Here nothing is stated but an *intention* to appoint. I think there must be an appointment, and a notification of such appointment to the other side.]

[POLLOCK, C. B. After sending that notice, Bradley was not bound to appoint Martin as his arbitrator; he might have appointed another person. He did not bind himself by that act. The company could not be certain that he would not appoint another party.]

[PARKE, B. If both parties consented to the act, it might have amounted to a submission to arbitration; but can Bradley be said to have appointed an arbitrator unless he actually appointed one?]

The name of the arbitrator need not be given to the other side, and the appointment to act for one and afterwards for both parties may be made by the same instrument.

Watson and *Cleasby*, for the railway company. There is no sufficient statement of the appointment of a single arbitrator, in the document of the 5th of December; nothing is stated beyond an *intention* to appoint an arbitrator; and the instrument of the 1st of January, 1850, states the appointment by way of recital only.

POLLOCK, C. B. Both rules must be discharged; but, under the circumstances, without costs.

PARKE, B. I am of the same opinion. It would be better for a claimant to appoint an arbitrator for himself, and then to give notice of such appointment to the other side. Then, if within fourteen days the company fails to appoint an arbitrator, the claimant may proceed to appoint one to act for both parties.

ALDERSON, B., concurred. — *Rules discharged, without costs.*

THE NORTH-WESTERN RAILWAY COMPANY v. M'MICHAEL.¹

November 7, 1850.

Evidence — Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16 — Register of Shareholders.

The register of shareholders of a company within the Companies Clauses Consolidation Act, authenticated by its seal, is admissible in evidence without any proof that such seal was affixed at an ordinary meeting of the company pursuant to the 9th section.

DEBT for calls on shares in the North-western Railway Company.

Pleas, general issue, and that the defendant was not the holder of the shares.

At the trial, before Cresswell, J., at the Liverpool Summer Assizes, in order to prove that the defendant was the holder, the register of the company, authenticated by its seal, was produced by the clerk to the secretary of the company, but was objected to as insufficient without evidence that the seal was affixed thereto at a meeting of the company, pursuant to the 9th section. The learned Judge overruled the objection, and the plaintiff obtained the verdict.

Cleasby now moved to set aside the verdict, on the ground that the register was improperly received. This is only evidence by virtue of the statute, which enacts, in sect. 28, that the production of the register of shareholders shall be *prima facie* evidence of the defendant being a shareholder and of the number and amount of his shares. That means the register described in the 9th section, which enacts "that the company shall keep a book to be called the register of shareholders, and in such book shall be fairly and distinctly entered from time to time the names of the several corporations, and the names and additions of the several persons entitled to shares in the company, together with the number of shares to which such shareholder shall be respectively entitled, distinguishing each share by its number, and the amount of the subscription paid on such shares and the surnames or corporate names of the said shareholders shall be placed in alphabetical order; and such books shall be authenticated by the common seal of the company being affixed thereto; and such authentication shall take place at the first ordinary meeting, or at the next subsequent meeting of the company, and so from time to time at each ordinary meeting of the company." The provisions of the statute should, therefore, be exactly complied with.

POLLOCK, C. B. If this objection be tenable, it would next be objected, that it must be proved that the meeting was duly called, and that those who voted were duly qualified. The document is produced, and the witness says, "This is the register of the company," and that is sufficient.

PARKE, B., and ALDERSON, B., concurred. — *Rule refused.*

Wilson v. The Caledonian Railway Company.

WILSON v. THE CALEDONIAN RAILWAY COMPANY.¹

November 22, 1850.

Scotch Railway Company — Service of Process.

Quære, whether process against a Scotch Railway Company can be served on its secretary in England.

A company was incorporated by statute for making a railway, part of the line lying in England and part in Scotland: the Act embodying the Companies Clauses Consolidation Acts for both countries. By a subsequent local act another Scotch Railway Company was amalgamated with the company. A party having a claim against the company in respect of certain shares arising out of that amalgamation, commenced an action in England, and served process on the secretary of the company while in London:—

Held, that this service was good.

REW had obtained a rule to set aside the service of the writ of summons in this case. The matter had been brought before Wilde, C. J., at chambers, who referred it to the Court. The defendant company was incorporated by the 8 & 9 Vict. c. 162, for the purpose of making a railway from Carlisle to Edinburgh and Glasgow and the north of Scotland. The statute embodied the Companies Clauses Consolidation Act for Scotland, 8 & 9 Vict. c. 17, generally, and the Companies Clauses Consolidation Act for England, Id. c. 16, "so far as might be necessary for carrying into effect the object and purposes of the act in relation to the portion of the railway and works in England." By the 137th section of the former of these, (corresponding in terminis to sect. 135 of the latter,) it is enacted, that "any summons or notice, or any writ or other proceeding, at law or in equity, requiring to be served upon the company, may be served by the same being left at, or transmitted through the post directed to the principal office of the company, or one of their principal offices, where there shall be more than one, or being given personally to the secretary, or in case there be no secretary, then by being given to any one director of the company." By a subsequent local act another Scotch Railway company was amalgamated with the company, and the plaintiff's claim was in respect to certain shares arising out of that amalgamation. The writ of summons was served personally on the secretary while in London: and the objection was that this was improper, the company being, at least for the purposes of the present suit, a Scotch company. *Evans v. The Dublin and Drogheda Railway Company*, 14 M. & W. 142; s. c. 14 Law J. Rep. (N. S.) Exch. 245, was referred to.

WILLES showed cause. This is an English corporation, for they have property in England which may be distrained. At common law, the process against a corporation was by distress of their goods, 1 Tidd's Prac. 121, until the Uniformity of Process Act, 2 Will. 4, c. 39, gave power to serve their officer. If therefore, this be an English corporation, the service here effected is good either by the general law or the Companies Clauses Consolidation Act for England, which

¹ 20 Law J. Rep. (N. S.) Exch. 6. 15 Jur. 17.

the act establishing the company makes applicable to the English portion of it. A debt contracted in Scotland may be sued for here, for it is transitory in its nature. *Mostyn v. Fabrigas*, Cowp. 161. *Debitum et contractus sunt nullius loci*. But if this kind of service is to be held good for some claims against the company and bad for others, the Court would be obliged to try on affidavits the nature of each action and the particulars sought to be recovered in it. *Evans v. The Drogheda Railway Company* is inapplicable; for there the statute pointed out a particular mode of service, and in the event of that being impracticable, another, and the plaintiff had resorted to the secondary mode without attempting the primary.

Rew, in support of the rule. It would be anomalous if English and Irish corporations could only be served in their respective countries, while Scotch corporations could be served not only in Scotland but also in England and Ireland: and it would be very inconvenient if a corporation were held to travel about with the person of its secretary, and on his death migrate into the body of each director. The service here effected would be good when the company is sued as an English corporation, as for instance for an accident occurring on the English part of the line. But if the mere fact of a corporation having property in England could affect the question of jurisdiction, the property of the Dublin corporation brought by them into England when coming over with an address might be seized here. [*Parke, B.* — You must not take for granted that it could not be seized.] Distress is to enforce, not give, jurisdiction. [*Platt, B.* — Suppose a passenger proceeding in one of the trains belonging to this company from Carlisle to a place in Scotland, were to meet with an accident after the train had passed the border, could it be contended that the company was not liable as an English company for a breach of the contract to carry safely? *Alderson, B.* Or suppose after the train entered Scotland the pocket of the passenger was picked, where is the thief to be indicted? *Parke, B.* The Companies Clauses Consolidation Act for Scotland contemplates that a Scotch company may be sued in England; for the 137th section says that "any summons or notice, or any writ or other proceeding at law or *in equity*," requiring to be served on the company, may be served in the manner there pointed out. Now this must refer to proceedings in England, for in Scotland law and equity are administered by the same tribunal.] The case of *Pilbrow v. Pilbrow's Railway Company*, 3 C. B. 730; s. c. 16 Law J. Rep. (N. S.) C. P. 11, shows that that section must not be construed literally.

PARKE, B. It will not be necessary to decide whether this service would be sufficient supposing the company to be merely a Scotch one; for it is impossible not to see that for some purposes at least it is an English one, and if an English company, this service is good service. In truth, it fills a double character: it is an English company so far as relates to the distance from Carlisle to the border, and Scotch for the rest, and the Companies Clauses Consolidation Acts both for

Job v. Butterfield & another.

England and Scotland are embodied into its act of incorporation. Now the plaintiff's claim which arises out of the amalgamation of the original company with another railway company is in respect of a duty imposed on the whole corporation, and affecting the whole of its property, and thus obligatory on it alike in its English and Scotch character.

ALDERSON and PLATT, BB., concurring. — *Rule discharged, with costs.*

JOB v. BUTTERFIELD and another.¹

November 22, 1850.

Venue, Changing — Application by one of two Defendants — Motion — Affidavits.

One of two defendants may, under ordinary circumstances, change the venue without the consent of the other.

A rule to discharge a rule for changing the venue need not be drawn up on reading the affidavits on which the original rule was obtained.

In this case a rule had been obtained by one of two defendants, on the common affidavit, to change the venue from London to York. A rule was afterwards obtained, on behalf of the plaintiff, to discharge this rule and bring back the venue to London; but it was not drawn up on reading the affidavit on which the first rule was obtained. The ground stated in the plaintiff's affidavit was, that the other defendant, Butterfield, had not given his consent to the venue being changed to York, but, on the contrary, was desirous that the action should be tried in London.

Milward showed cause. There is a preliminary objection in this case. The present rule is not drawn up on reading the affidavit on which the rule to change the venue was obtained. *Cooper v. Foulkes*, 2 Sco. N. R. 200, shows that where a defendant moves to set aside a rule for a *distringas*, on the ground that it has been improperly obtained, he ought to bring before the Court the affidavits on which the motion for it was founded. *Needham v. Bristowe*, 4 Ibid. 773; s. c. 11 Law J. Rep. (N. S.) C. P. 207, is to the same effect.

[PARKE, B. It is enough that the plaintiff states in the present affidavits that the rule was obtained by one of the two defendants.]

Secondly, one defendant has the power of changing the venue. *Box v. Read*, Pract. Regis. C. P. 430; s. c. Barnes, 3d edit. 482, is precisely in point. *Braddeley v. Rippon*, 5 Taunt. 87, and *Groves v. Thackery*, Ibid. 631, decide that one defendant cannot remove the venue to a county palatine, because the Court has in that case no

¹ 20 Law J. Rep. (N. S.) Exch. 8.

authority to bind the other defendant to the terms of not assigning error on the want of an original writ. But the very reason given for those decisions, namely, that the plaintiff would be prejudiced, shows that in an ordinary case one defendant would have the power. There is an *Anonymous Case*, 2 Chit. Rep. 417, which leads to the same conclusion.

R. Miller, in support of the rule. It is laid down in the last edition of *Archibold's Practice*, p. 1165, that one of several defendants cannot change the venue without the consent of the others. The reason is, that one defendant is not to be prejudiced by the act of the other. The application ought to be made by both.

[*PARKE, B.* One defendant has a right to change the venue. The plaintiff was wrong in bringing it in a place where the cause of action did not arise.]

The affidavits in the present case show that the plaintiff would be prejudiced by the action being tried in York.

PARKE, B. Then let the plaintiff make an application to the Court on special grounds, and the defendant will have an opportunity of answering them. The cases that have been cited of a refusal by the Court to change the venue proceed on the ground that the plaintiff would be prejudiced by that step. But *Box v. Read* is a clear authority that in ordinary cases one defendant may change the venue: and he ought to have that power where the action is not brought, as the statute requires, in the county where the cause of action arose. The very distinction taken in those cases shows that in an ordinary case the venue may be changed. The rule will be discharged, with costs.

POLLOCK, C. B., ALDERSON, B., and PLATT, B., concurred. — Rule discharged, with costs.

JONES v. JOHNSON and MORGAN.¹

November 2, 1850.

Replevin against Magistrates alone — Distress for Borough-rates — 5 & 6 Will. 4, c. 76, s. 92 — 4 & 5 Will. 4, c. 48 — 55 Geo. 3, c. 51 — 1 Vict. c. 81 — Borough-rate not made in public — Validity of Warrant — Retrospectiveness of Rate — Receipt and Date of Warrant — Statement in Warrant — Jurisdiction — Time of Sale under 27 Geo. 2, c. 20.

The council of the borough of Lichfield, before making a borough-rate, made an estimate pursuant to 5 & 6 Will. 4, c. 76, s. 92, in which was included an item of 105*l.* 14*s.* 10*d.* in respect of three years arrears of salary awarded to a former town clerk as compensation for his discharge. The same party having also recovered against the town council 46*l.* for damages and costs, and threatening execution against the corporation, received pay-

¹ 20 Law J. Rep. (N. S.) M. C. 11.

Jones v. Johnson & Morgan.

ment for that amount from the attorney for the council, who intended to charge it to the council as a disbursement, but had not delivered his bill of costs. In respect of the sum of 467*l.* and the attorney's bill of costs, the sum of 800*l.* was introduced into the estimate. The council afterwards made a borough-rate, including the above sums.

At a meeting which was *not public*, the borough council made an order which directed the overseers of certain parishes within the borough to pay the proportions assessed upon their parishes out of the poor-rates *made and collected*; and they also issued a warrant to their treasurer, commanding him within 100 days from the date thereof to demand from the overseers the said proportions. The treasurer made his precept to the overseers, requiring them within 100 days after the receipt thereof to pay the proportions out of the poor-rates made and collected *or to be made and collected*. The plaintiff, an overseer, not having paid the proportions assessed on his parish, a warrant was issued by the defendants, being the mayor and justices of Lichfield, commencing thus, "*Borough and city of Lichfield.*" The warrant then directed certain parties to levy the sum of 77*l.* 16*s.* 1*d.* by distress of the plaintiff's goods, and provided that "if within the space of five days next after such distress by you taken the sum of 77*l.* 16*s.* 1*d.* shall not be paid, that then you do sell the said goods." "Given under our hand and seal, and under the corporate seal of the said borough city. T. T. (L. s.), M. B. M. (L. s.) justices of the said borough and city. (Corporation seal) *Thomas Johnson, Mayor.*" The defendant, Johnson, was not stated in the body of the warrant to be mayor of the borough:—

Held, first, that a borough-rate need not be made in public. Secondly, that as the rate was good upon the face of it, even although it might be retrospective in fact, (which, *semble*, it was not,) no advantage could be taken of that circumstance as against the defendants. Thirdly, that the warrant was not bad by reason of its directing the sum to be paid out of the rates to be *made and collected*; nor, fourthly, in directing the overseers to pay the sum within 100 days after the receipt of the warrant. Fifthly, that it sufficiently appeared from the warrant, that one of the defendants was mayor of the borough at the time of making the warrant. Sixthly, that the warrant of distress appeared to have been made within the jurisdiction of the mayor and justices. And, lastly, that the warrant was not bad, under the 27 Geo. 2, c. 20, in not fixing the time at which the sale of the plaintiff's goods was to terminate.

An action of replevin may be maintained against magistrates *alone* who issue a warrant of distress against the goods of a party.

REPLEVIN. Plea, not guilty, (by statute.) The first avowry, by both defendants, after stating that Lichfield was a borough with a body corporate, that the borough fund was insufficient for the purposes of the 5 & 6 Will. 4, c. 76, that the council of the borough made an estimate of what would be sufficient, and ordered a borough-rate in the nature of a county-rate, appointed one J. W. Proffitt the collector, and ordered that the sum of 666*l.* 16*s.* 1*d.*, then payable by St. Mary's parish, should be paid by the overseers of the said parish to the said J. W. Proffitt, out of the poor-rates made and collected, *or to be made and collected*, for the said parish. The avowry then stated the non-payment by the overseers of the sum of 77*l.* 16*s.* 1*d.*, balance of the above sum, and the issuing a distress warrant in respect thereof. There was a second avowry, not material to be mentioned.

Plea in bar to the first avowry, *de injuria*.

At the trial, which took place at the Staffordshire Summer Assizes, 1850, a special verdict was found, which stated, in substance, that Lichfield was a borough corporate; that the defendants were two of the justices of the borough; that at the time of making the borough-rate thereafter mentioned, the borough fund was not sufficient for the purposes of the act of 1 Vict. c. 81; that a meeting of the borough council was held, which was *not a public meeting*, the members of the town council and the reporters of the press only being allowed to be present; and that the said council made a rate. The order of coun-

cil was then set forth, which ordered a borough-rate to be made, by which the parishes of St. Michael, St. Mary, and four other parishes and places, being within the borough, were assessed at certain sums. It was then ordered that the church-wardens and overseers of the above-mentioned parishes and places should pay the amount of their proportions "out of the poor-rates *made and collected*." That J. W. Proffitt, treasurer of the borough, should make demand, in writing, of the said church-wardens and overseers of the respective sums assessed on the parishes, &c., and which sums the church-wardens, &c., were required to levy and pay to the treasurer within 100 days after demand; and in case the said church-wardens, &c., should neglect to levy and pay the said sums within 100 days after demand, he should levy the same by distress of the goods of such church-wardens and overseers. The verdict then set out an estimate of expenses made at the meeting of the said council. This estimate contained the following, amongst other items: "Compensation to the late town clerk, three years and a half, 105*l.* 14*s.* 10*d.*; law expenses, 800*l.*" The item of 105*l.* 14*s.* 10*d.* was introduced under the following circumstances: A Mr. Simpson had been town clerk of Lichfield before and at the passing of the Municipal Corporation Act, when he was dismissed from his office by the town council. He thereupon claimed compensation, and, being refused, obtained a *mandamus*, on which he recovered against the council 467*l.*, for damages and costs. Afterwards, compensation was awarded to him by an annuity of 30*l.* Being dissatisfied with that, he appealed to the Treasury; and whilst that appeal was pending, the sum of 105*l.* 14*s.* 10*d.*, being the arrears of the annuity, was included in the estimate. The sum of 800*l.* was introduced into the estimate under the following circumstances: A. Eggington, the town clerk of the borough, and attorney for the council in the *mandamus*, paid to the said Mr. Simpson the said sum of 467*l.*, intending to charge it to the council as a disbursement. He had not delivered a signed bill to the council on the 19th of July, 1847. He paid the money spontaneously, and to save the corporation from an execution. The sum of 800*l.* was introduced into the estimate as a sum that would be required to pay Mr. Eggington's bill of costs for that and other suits, then unascertained, including, as a disbursement, the said sum of 467*l.* On the 19th of July, 1847, a warrant by the mayor of the borough, sealed with the corporate seal, was, by order of the council, issued to J. W. Proffitt. This warrant commanded him, within 100 days *from the date thereof*, to demand from the said church-wardens, &c., the above sums assessed upon those parishes; and if the said church-wardens, &c., should refuse or neglect to pay the same within 100 days after demand and notice, then to give information thereof to the said council. The said J. W. Proffitt, on the said 19th of July, made his precept to the said church-wardens and overseers of St. Mary, (the plaintiff being one,) in which, after reciting the order and warrant of the council, he required that, "within 100 days *next after the receipt*" thereof by them, they should pay to him, "out of the poor-rates made and collected, *or to be made and collected*," the sum of 666*l.* 16*s.* 1½*d.* On the 29th of July, 1847, a copy of this precept was

left at the house of the plaintiff, one of the overseers of St. Mary. The rate was appealed against, and confirmed. The church-wardens and overseers of St. Mary afterwards paid to J. W. Proffitt, on account of the sum of 666*l.* 16*s.* 1*d.*, the sum of 513*l.*, but not the residue of that sum. The plaintiff went out of office as overseer in March, 1848. On the 11th of July, 1848, the plaintiff was summoned before the defendant, Thomas Johnson, being the mayor, and the other defendant, M. B. Morgan, then being a justice of the peace of the borough, in respect of the non-payment by them of the balance of the sum assessed on the parish of St. Mary. On the day named in such summons the plaintiff attended before the defendants, promised to pay the residue, and did pay the further sum of 76*l.* on account of the balance of 153*l.* 16*s.* 1*d.* The verdict then set out other facts not material to be mentioned, relating to the alteration of the date of the warrant. The warrant under which the distress was made bore date the 14th of August, 1848. It commenced thus: "*Borough and city of Lichfield*," was directed to J. W. Proffitt and others, and commanded them to levy 77*l.* 16*s.* 1*d.* by distress of the goods of the plaintiff and others; and if within the space of five days next after such distress by you taken, the sum of 77*l.* 16*s.* 1*d.* shall not be paid, that *then* you do sell the said goods," &c. "Given under our hands and seals, and under the corporate seal of the said borough and city, this 14th day of August, A. D. 1848. T. Johnson (L. s.,) M. B. Morgan, (L. s.,) Justices of the said borough and city. Thomas Johnson, Mayor, (corporate seal.)"

Gray, (Keyser with him,) for the plaintiff. First, the rate was bad, as it was not made in public. By the Municipal Corporations Act, 5 & 6 Will. 4, c. 76, s. 92, the borough Justices are "to order a borough-rate in the nature of a county-rate to be made within their borough, and for that purpose the council of such borough shall have within their borough all the powers which any Justices of the Peace assembled at the General or Quarter Sessions have," under the 55 Geo. 3, c. 51, "or as near thereto as the nature of the case will admit." The 55 Geo. 3, c. 51, s. 1, empowers county Justices "assembled at their General or Quarter Sessions" to make county-rates. Then comes the 4 & 5 Will. 4, c. 48, which, after reciting in sect. 1 that doubts had existed whether the business of making county-rates should be transacted publicly and in open Court, enacts, that it shall be transacted publicly and in open Court. This last is a declaratory act, and, therefore, shows what construction ought to be placed on the 55 Geo. 3, c. 51.

[PARKE, B. The meaning of the 5 & 6 Will. 4, c. 76, s. 92, is merely, that the Borough Justices are to possess the powers given by the 55 Geo. 3, c. 51.]

Secondly, the rate is retrospective, for it was made to repay the arrears of the discharged town clerk's salary, and also to reimburse the attorney of the town council the sum he had paid in respect of damages and costs. *Woods v. Reed*, 2 Mee. & W. 777; s. c. 9 Law J.

Rep. (N. S.) M. C. 105, decides that, under this very 92d section, the council of a borough have no power to make a retrospective rate.

[PARKE, B. referred to *Chesterton v. Farlar*, 7 Ad. & E. 713; s. c. 7 Law J. Rep. (N. S.) Q. B. 66.]

The 1 Vict. c. 81, was passed in consequence of the decision of *Woods v. Reed*, and by sect. 2, enables the council of a borough to levy a rate for defraying expenses previously incurred in carrying the Municipal Act into execution.

[PARKE, B. Were the town council at liberty to make a rate upon the chance of their being defeated in the litigation, and of having the costs and expenses to pay? At what time is a rate to be made in a case where an action is depending by the result of which the council may perhaps be compelled to pay 1000l. ?]

They may make a rate as soon as they are engaged in litigation.

[ALDERSON, B. On what principle are they to make the estimate ?]

In the best manner they are able.

[PARKE, B. The 5 & 6 Will. 4, c. 76, s. 92, empowers the council "to estimate as correctly as may be what amount in addition to such (borough) fund will be sufficient for the payment of the expenses *to be incurred*." The council are not to be held very tightly to those words. Surely, it would have been enough if they had made a rate as soon as the costs of the legal proceedings had been taxed.]

This Court will decide according to the authority of *Woods v. Reed*, and leave the parties to their writ of error.

Thirdly, the 1 Vict. c. 81, s. 1, authorizes the overseers whose parishes are liable to the borough-rate to pay the amount "out of the poor-rate made and collected, or to be made and collected." But here the council by their order directed the overseers of the parishes assessed to pay their quota "out of the poor-rates *made and collected*." They then directed their warrant to the treasurer, Mr. Proffitt, who, by his precept, required the overseers to pay the amount "out of the poor-rates made and collected, *or to be made and collected*." The warrant is bad by reason of the introduction of these latter words "or to be made and collected," for the treasurer had no right to insert them in his precept.

Fourthly, the treasurer directs the church-wardens and overseers to pay the sum assessed within 100 days from the *receipt* of the precept, whereas the warrant of the council addressed to him requires him to pay it within 100 days from the *date* of the warrant to him. This vitiates the warrant of distress.

[PARKE, B. The treasurer extends the time of payment. It would have been a different thing if he had curtailed it. Here he allows the overseers more time for payment than he was directed to give them.]

Fifthly, it does not appear in the body of the warrant that the defendant, Johnson, was mayor of the borough at the time of issuing the warrant; and, moreover, the warrant was altered after it had been issued.

Sixthly, it does not appear that the justices were acting within their jurisdiction when they made their warrant, for they merely describe themselves as "justices of the said borough and city," and do not use the ordinary words "in and for" the city, &c. In *The Queen v. Stockton*, 14 Law J. Rep. (N. S.) M. C. 128, a complaint by overseers before magistrates was held to be bad in stating that it was made "before us, A. and B., two justices for the county of C."

[PARKE, B. The following passage from 2 Hawk. P. C. book ii. s. 23, is in point, "It is safe, but perhaps not necessary, in the body of the warrant, to show the place where it was made; yet it seems necessary to set forth the county in the margin at least, if it be not set forth in the body."]

Lastly, the warrant is bad, not being in conformity with the 27 Geo. 2, c. 20, relative to distresses by warrants of justices. The 1st section of that act enacts, that the justices are by their warrant to limit the time for selling the goods distrained, "so as such time be not less than four days nor more than eight days." Here no limit is fixed for the duration of the sale, and it may consistently with this warrant have lasted twenty days.

[PARKE, B. The word "then" sufficiently proves the time.]

In *The Queen v. Williams*, 19 Law J. Rep. (N. S.) M. C. 126, a warrant of distress was held bad which directed the goods to be sold "forthwith." ✓

Keating, (*Whitmore* with him,) for the defendants. First, the meeting of the council at which this rate was made was publicly and duly convened. It was not necessary that the doors should be thrown open to the public.

[POLLOCK, C. B. A council in a borough does not hold an open court at all.]

[ALDERSON, B. The 4 & 5 Will. 4, c. 48, was passed in consequence of the discordant practice that had prevailed in various counties in making county-rates. In some cases the meetings of the magistrates were private, in others they were public.]

Besides, the justices are not a representative body, whereas the borough councils are, and that may be a reason why the public ought to be admitted in one case, and may be properly excluded in the other.

[ALDERSON, B. The sitting in public is not a "power," but rather a restriction.]

The King v. The Justices of Nottingham, 3 Ad. & E. 500; s. c. 4 Law J. Rep. (N. S.) M. C. 113, is in point.

Secondly, this rate is not retrospective. *Woods v. Reed* does not touch this case; it related to different expenses from those which are now in question. Can it be contended that a rate is void which is retrospective in respect of a single shilling? In truth, the expenses in question are such as cannot be provided for prospectively; for instance, law expenses cannot be correctly estimated beforehand.

[ALDERSON, B. The borough council are to make an estimate.]

A dismissed officer claims 500*l.* as compensation; the council con-

sider him not entitled to any thing: how can they make a correct estimate in such a case? The rate is as prospective as under the circumstances it could be. *The Queen v. Read*, 18 Law J. Rep. (N. S.) M. C. 164, shows that, although rates are not to be made retrospectively, yet when overseers, by reason of a balance in hand of an old rate, or the getting in of an uncollected rate on which a particular debt is chargeable, are enabled to defer the making of a new rate, such debt may be properly paid out of the new rate, and this applies peculiarly to the expenses of litigation. There is great difficulty in making a rate like the present, which shall not be open to some objection or other. For instance, if the borough council estimate that a larger sum will be required than ultimately happens to be necessary, they do injustice to present rate-payers who may subsequently leave the borough, and who practically will not get their payments returned to them. On the other hand, if the estimate is too small, and they raise too little, then, when they levy the balance, it would, on the principles of the present argument, be contended that that rate was retrospective. The truth, however, is, that if the council make their estimate fairly and reasonably, any rate subsequently assessed for the purpose of making up the deficiency cannot, according to true legal principles, be considered retrospective. In *The Attorney General v. The Corporation of Lichfield*, 17 Ibid. Chanc. 472, it is laid down that a municipal corporation ought to provide, as far as is practicable, for the expenses of each year out of the income of that year, but that the rule will not be so strictly applied as to prevent under all circumstances the payment of a prior debt out of the moneys raised by a subsequent rate. But, conceding that this rate is in fact retrospective, the present proceeding is not the proper mode of taking advantage of the defect, for the present defendants are not the parties who are to allow the rate; their duty is merely to issue a warrant if it be not paid. *Marshall v. Pitman*, 9 Bing. 595; s. c. 2 Law J. Rep. (N. S.) M. C. 33. Again, the rate is good upon the face of it. But, according to the argument on the other side, if it be retrospective to the extent of a single shilling, it would be bad. They referred to 11 & 12 Vict. c. 44. Besides, replevin will not lie against magistrates alone; it lies against those only who take the goods. *George v. Chambers*, 11 Mee. & W. 149; s. c. 12 Law J. Rep. (N. S.) M. C. 94.

[PARKE, B. In this case, the magistrates are the actors; they claim to have the goods returned to them; they have ordered a party to take the goods. Replevin lies against magistrates who order a man's goods to be taken.]

Thirdly, the alleged variance between the warrant of the council and the treasurer's precept to the bailiff does not vitiate the proceedings. The words "made and collected" mean any rate that may hereafter be made and collected. Besides, the plaintiff has sustained no injury thereby.

Fourthly, the plaintiff surely cannot be entitled to complain that by the language of the precept his time of payment is extended, and that, instead of being compellable to pay after 100 days from

the date of the warrant, he is to pay after 100 days from the service of it.

Fifthly, the language of the warrant sufficiently shows that the defendant, Johnson, was mayor of the borough, and the warrant clearly was not signed after it had issued.

Sixthly, the order was made within the jurisdiction of the justices. In *The Queen v. Stockton*, the objection was that the complaint of the overseers did not appear to have been made within the jurisdiction, and the complaint was not set out; but here the words in the margin, "Borough and City of Lichfield," coupled with the use of the corporate seal and the signature of the defendant, Johnson, show that the warrant was made within the jurisdiction, for it would be absurd to suppose that the magistrates went out of the borough to sign the warrant.

Lastly, the warrant is not bad in omitting to fix the period at which the sale of the goods is to terminate. The present warrant is in conformity with the precedents in Burn's Justice and other books. The word "then" is a direction to the bailiff to sell at the expiration of the fifth day.

[POLLOCK, C. B. The magistrates are bound to fix the time for the commencement, but not for the conclusion of the sale.]

Gray, in reply, cited *Pallister v. The Mayor, &c., of Gravesend*, 19 Law J. Rep. (n. s.) C. P. 358; *Tawney's Case*, 2 Salk. 531; *Lanchester v. Tricker*, 1 Bing. 201; s. c. 1 Law J. Rep. C. P. 65; and *The King v. Sillifant*, 4 Ad. & E. 354.

POLLOCK, C. B. I think the defendants are entitled to judgment. The cases cited by the plaintiff's counsel seem to point to the conclusion that rates must not be retrospective. But in *Woods v. Reed* the only question upon which the Court gave an opinion was that a borough-rate which was retrospective was bad. In the present case it was the duty of the borough council to make an estimate of the expenses, if by possibility that could be done, and to provide prospectively for those expenses. It may, however, happen that that cannot be done; for instance, many persons may fail to pay their rates, or the rates may become unproductive on other grounds. Against all these matters the council cannot make provision. I think, under circumstances like the present, if a rate is made prospectively, and it proves to be insufficient, and another is wanted, it may be made. In this case the rate is not, in my opinion, retrospective, for it is *bona fide*, and the council expected to have to pay a larger sum of money as soon as the bill of their attorney was sent in. The object of the statute was to enable the council to pay their debts, and when the council act *bona fide*, we ought to construe the clause applicable to this point as directory only. With regard to the question of the rate being made publicly, it is an answer to say that the Municipal Corporation Act has given generally to town councils the same powers as county Justices in Quarter Sessions assembled possess. And what strengthens the opinion that the meeting of the council need

not be a public one is, that no reference is made in the Municipal Corporation Act to that act of Parliament, the 4 & 5 Will. 4, c. 48, which directs Justices to make county-rates in open Court. The 92d section in the Municipal Act is the section that applies to this case. But the council is not a Court, whereas the Quarter Sessions are a Court, and the meetings of the council take place in private. As to the point relating to the 100 days, I think the defendants' counsel has given a sufficient answer to it. As to the other point, I think the meaning of the order of the council is, that the money is to be raised out of the rates made and collected, *or to be made and collected*. I also think there is no force in the objection to the warrant in respect of the time when it is to be executed.

PARKE, B. I think all the objections made by the plaintiff fail. As to the first objection, that the council ought to sit in public. It is founded on the avowry and on the act of Parliament. [His Lordship read the avowry.] Now, that avowry, as far as it respects the making of the rate in public, is not supported by the evidence, but the statement is mere surplusage, unless the council is bound to sit for the transaction of business with open doors. The Municipal Corporation Act directs the borough council to make a borough-rate in the nature of a county-rate. The 4 & 5 Will. 4, c. 48, only applies to the proceedings of county Justices, whose practice in making county-rates varied in different districts, it being usual in some counties to make them publicly, in others privately. The town council of a borough is not, however, a Court, and is not bound to sit with open doors; and if the legislature had intended that that should be the practice, they would not have omitted in the Municipal Corporation Act all reference to the 4 & 5 Will. 4, c. 48. The next objection is, that the rate is retrospective, on the ground that the estimate of the council included by-gone expenses, and the principal objection is, that the solicitor of the corporation paid a certain sum of money for costs to save the corporation from an execution, which sum was to be included in the bill that he had not then delivered. I think this circumstance does not affect the question as against the defendants, for they issue their warrant in respect of a rate which is good on the face of it. The council have estimated the money that is to be repaid to the solicitor, and if the rate is good upon the face of it, although made for by-gone expenses, it is not a bad rate as regards the defendants, unless it be clear on the face of it that it was meant to include by-gone expenses. In *Chesterton v. Farlar*, in a suit for non-payment of a church-rate, a prohibition was moved for to the Privy Council, to which an appeal had been made, on the ground that the rate appeared to be retrospective and bad, from the facts stated in the pleadings. The Court refused to grant a prohibition, the cause being before a Court the jurisdiction of which was not denied, no erroneous proceeding having taken place there, and the Court refusing to presume that the Judicial Committee would act incorrectly. *The King v. Sillifant* seems to show merely that where a rate was regular on the face of it, but appeared to have been made to meet past disbursements, it was not,

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therefore, bad, whatever objection might be raised to a retrospective application of the money in passing the church-warden's accounts. Therefore, in the present case, if the town council were wrong in making a retrospective rate, no advantage can be taken of that fact in an action against the defendants in this case, being the magistrates, who enforce the rate by distress. I by no means say that the town council were wrong in the course they took; they thought they were right, and there was nothing fraudulent in their conduct. Some latitude must be allowed to them under the circumstances, for they cannot ascertain in all cases with exactness the amount of money that will be wanted, but are bound to raise as nearly as possible the sum that will be required. I, therefore, do not say that this order of the council was not warranted. In *Woods v. Reed*, the only point decided was, that, under the Municipal Corporation Act, the borough council had no power to make a retrospective rate. But there the expenses were clearly by-gone; here it is doubtful whether they are by-gone. Again, supposing the expenses to be by-gone, and the rate to be good upon the face of it, the time for making the objection is when the accounts are allowed. The next objection is, that the order of the council directs the several overseers to pay their respective proportions of such borough-rate out of the "poor rates *made and collected*," and that the avowry states that the overseers are ordered to pay their proportions of the rate out of the "poor-rates made and collected, or to be made and collected. Now, it appears that by that statute, 55 Geo. 3, c. 51, the overseers are empowered to make a rate, in order to raise the sum assessed on the parish, or to reimburse themselves by a rate, so that the money may either be ordered to be paid out of a rate already made, or a special rate may be made for the purpose. But it is said, that there is a variance between the avowry and the order of council: the latter limiting the payment to be made out of the rates already "made and collected." Now, the words of the statute are not to be construed with extreme strictness. The act of Parliament directs the payments to be made out of a rate made or to be made. All that is meant is, that the payments are to be made out of the poor-rates, and the words in the warrant of the council "made and collected" may mean such rates as shall be made and collected at the time of payment. The next objection is, that the order of council directs the overseers to pay their proportions within 100 days after service upon them of the order. Then the precept requires the overseers to pay the amount within 100 days after demand. That order does not limit the time for payment given by the 55 Geo. 3, c. 51, but, on the contrary, extends it. The overseers, therefore, have had the whole of the 100 days from the time of the service of the demand upon them to pay the rate. The next objection is, that the mayor's name was not mentioned in the warrant. This is a purely technical objection, and cannot prevail. There is no ground for saying that the signature may not be considered as part of the warrant. It is then said that the warrant was invalid by reason of its being altered after it was issued; but this is not the case. The date was altered whilst it was in the possession of the Justices, and they were clearly at lib-

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erty to alter it at that time. The next objection is, that the warrant does not appear to have been issued within the jurisdiction of the Justices, and *The Queen v. Stockton* was referred to. But it does appear to have been issued within the jurisdiction, for we may take the venue in the margin as constituting the date of the warrant; in addition to which the passage from 2 Hawk. P. C. book ii. c. 13, s. 53, cited by me during the argument, is conclusive. The next objection arises on the 27 Geo. 3, c. 20. It is said that the warrant of distress does not fix the limit of the sale, and that there ought to be some limit fixed. Now, the stat. 27, Geo. 2, c. 20, enacts that the time for selling the goods shall "be limited in such warrant so as such time shall not be less than four days nor more than eight days." The obvious meaning of that enactment is to fix the time within which the party distrained upon may tender the sum due and pay the costs. In the present case, five days are named for this purpose in the warrant, and "then" the bailiff is to sell the goods. The warrant, it is true, does not say when the sale is to be finished; but this is not necessary. All the precedents are in the form pursued by this warrant. If, indeed, the warrant had directed the sale to take place forthwith, it would be bad, as it would not then give the party distrained upon sufficient time to turn about him, and procure the means of payment. This was determined by the case of *The Queen v. Williams*, which has been referred to. On the whole, I am clearly of opinion that the warrant was good. The judgment will, therefore, be for the defendants.

ALDERSON, B., and PLATT, B., concurred. — *Judgment for the defendants.*

HARVEY v. HUDSON.¹

November 13, 1850.

Case for not obeying a Habeas Corpus ad satisfaciendum — Not Guilty by Statute — Discharge by the Insolvent Court under 1 & 2 Vict. c. 110 — Validity of Order and Warrant.

Case against the keeper of the Queen's Prison for not having the body of a debtor before the Exchequer, pursuant to a writ of *habeas corpus ad satisfaciendum*. Plea, not guilty by statute. The defendant had in his custody a debtor, detained at the suit of the plaintiff on a *ca. sa.* from the Palace Court. The debtor subsequently petitioned the Insolvent Court for his discharge under 1 & 2 Vict. c. 110, s. 35. On the 7th of January, the vesting order was made. On the 27th of March the plaintiff sued out a *habeas corpus ad satisfaciendum*, returnable on the 15th of April, to charge the defendant in execution. On the 8th of April the Insolvent Court ordered the debtor to be discharged *forthwith* as to debts due on the 7th of January, excepting a debt due from the plaintiff, and as to that, that he should be discharged as soon as he should have been in custody at the suit of the plaintiff for three months, to be computed from the time of the vesting order. The warrant, dated the 9th of April, directed the discharge of the debtor in conformity with the terms of the vesting order, and on that day the prisoner was discharged. The defendant, on the 15th of April, returned to the writ of *habeas* that the debtor was discharged by a warrant of the Insolvent Court: —

¹ 20 LAW J. Rep. (N. S.) Exch. 11.

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Held, first, that the defendant was entitled to give the act and the special matter in evidence under the plea of not guilty by statute, pursuant to the 1 & 2 Vict. c. 110, s. 110.

Quære—If the defence was open to the defendant under the plea of not guilty.

Secondly, that the defendant was bound to discharge the debtor; that he had no power to detain him until the return of the writ, or to take bail for his appearance thereto, or to retake him after his discharge.

Thirdly, that the warrant was not void, its meaning being that the debtor was to be discharged forthwith.

CASE against the keeper of the Queen's Prison. The declaration stated that the plaintiff, by the judgment of the Court, had recovered against one W. P. Hallows a debt of 20*l.* 7*s.* 3½*d.*, and 24*l.* 19*s.* 8*d.* damages; that Hallows being then a prisoner in the Queen's Prison, of which the defendant was the keeper, the plaintiff sued out a *habeas corpus ad satisfaciendum* directed to the said keeper, directing him to have Hallows before the Barons of the Exchequer to satisfy the plaintiff his debt and damages; that the defendant suffered Hallows to be at large, and had not his body according to the exigency of the writ, and returned to the Court that Hallows was discharged out of his custody by the warrant of the Insolvent Court, and that Hallows was not in custody at the suit of the plaintiff, nor had he surrendered or been produced before the Barons of the Exchequer.

Plea, not guilty, (by statute.)

At the trial, before Martin, B., at the sittings in this term, the facts appeared to be as follows: The defendant, who was the keeper of the Queen's Prison, had in his custody one W. P. Hallows, who was detained at the suit of the present plaintiff upon a *ca. sa.* issued out of the Palace Court. On the 2d of January, Hallows signed his petition for his discharge under the Abolition of Imprisonment for Debt Act, 1 & 2 Vict. c. 110, s. 35. On the 7th of January, the vesting order was made, and on the 4th of March, the insolvent filed his schedule. On the 27th of March, the plaintiff sued out a *habeas corpus ad satisfaciendum*, returnable on the 15th of April. On the 8th of April the petition came on for hearing, when the Insolvent Court made the following order for his discharge.

It is adjudged and ordered that the prisoner shall be discharged out of custody *forthwith*, as to the several debts claimed to be due on the 7th of January, 1850, being the time of making the vesting order "excepting as to a certain debt due from the said prisoner to Joseph Harvey, (the plaintiff,) and also as to a certain other debt due from the said prisoner to J. D. Davis; and forasmuch as it appears to the said Commissioner that the said prisoner hath put the said J. Harvey to unnecessary expense by a vexatious defence to a suit for the recovery of his debt, it is adjudged and ordered that the said prisoner shall be discharged from custody, and entitled to the benefit of the said act as to the said J. Harvey, so soon as the said prisoner shall have been in custody at the suit of the said J. Harvey, creditor for the same debt, for three calendar months, *to be computed from the said time of making such vesting order as aforesaid.* And forasmuch as it appears to the said Commissioner that the said prisoner hath contracted the debt with the said J. D. Davis by means of false pretences,

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it is adjudicated and ordered that the said prisoner shall be discharged from custody and entitled to the benefit of the said act as to the said J. D. Davis, as soon as the said prisoner shall have been in custody at the suit of the said J. D. Davis, creditor for the same, for the period of eight calendar months, to be computed from the said time of making such vesting order as aforesaid." On the same 8th day of April, on detainer having been lodged against the prisoner at the suit of J. D. Davis, the following warrant was made for his discharge:—

"Upon adjudication duly made herein, it is ordered that the said prisoner shall be discharged from your custody *forthwith*, as to the detainer of W. G. Smith, and that the said prisoner shall be discharged from your custody as to the detainer of J. D. Harvey, at the period of three calendar months, *to be computed from the 7th day of January, 1850*, being the time of making the order vesting the estate and effects of the said prisoner pursuant to the statute in that behalf. And for so discharging the said prisoner from custody as to the several detainers respectively, this shall be your sufficient warrant.

"By the Court.

"To the jailer or keeper of the said jail."

This warrant was left at the Queen's Prison, on the 9th of April, and on that day the prisoner was discharged. The defendant, on the 15th of April, returned that Hallows was discharged out of his custody as to the detainer of the plaintiff on the 9th of April, by a warrant of the Insolvent Debtors Court. Under these circumstances, the learned Judge directed the jury that the defendant, as keeper of the prison, was not bound to look to the adjudication, but merely to obey the warrant, and that his return was proper. He also ruled that the defence might be given in evidence under the plea of not guilty, (by statute.) The jury found a verdict for the defendant.

Badeley now moved for a new trial, on the ground of misdirection. First, the defendant was not entitled to plead the general issue, and give his defence in evidence under it. Secondly, supposing him to be so entitled, he was bound to keep Hallows, the debtor, in his custody, and have him before this Court at the return of the writ of *habeas corpus*. As to the second point, the adjudication is bad, as it directs the debtor to be kept in prison for three months, which period had expired at the date of the adjudication. It is insensible and nonsensical. Again, the adjudication is bad on another ground, for the 76th section of the 1 & 2 Vict. c. 110,¹ directs the Commissioner to discharge the prisoner so soon as he shall have been in custody, at the suit of one or more of the persons as to whose debts and claims

¹ Sect. 76 enacts, "That in all cases where no cause shall appear to the contrary, it shall be lawful for the said Court or commissioner or justices, according as shall seem fit, to adjudge that such prisoner shall be so discharged, and so entitled as aforesaid, *forthwith*, or so soon as such prisoner shall have been in custody at the suit of one or more of the persons as to whose debts and claims such discharge is so adjudicated for such period or periods, not exceeding six months in the whole, as the said Court or commissioner or justices shall direct, to be computed from the making of such vesting order as aforesaid."

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such discharge is adjudicated, for a period of not more than six months; but here the debtor had not been in custody at the suit of the plaintiff at all, for the writ of *habeas corpus* is not a writ of execution.

[PARKE, B. The keeper of the prison is bound to notice the warrant, and not the adjudication.]

The warrant is bad and absurd. It directs the prisoner to be discharged "forthwith" as to one debt, and as to the other to be discharged at a future period, to be computed from a time that is past.

[PARKE, B. This is a mere periphrastic order, directing the prisoner to be discharged forthwith.]

By the 76th section the discharge in a case like the present must take place at a future period, and an order for his discharge forthwith would be bad.

[ALDERSON, B. All that the jailer has to do is to attend to the warrant. If he sees that the expression in it, although an awkward one, is equivalent to a direction to him to discharge the debtor forthwith, he is bound to obey such direction. He is not to criticize the grammar of the Court.]

[POLLOCK, C. B. It is clear that the defendant, having once discharged him under this order, could not re-take him by virtue of the *habeas corpus*.]

The defendant was bound to obey the writ.

[POLLOCK, C. B. The writ was spent when the debtor was discharged.]

[MARTIN, B. The effect of the *habeas* is to compel the defendant to bring up the debtor, provided he has him in his custody at the return of the writ.]

[ALDERSON, B. Your objection, that the day of discharge is to be computed from a day that is past, would apply to many sentences at the assizes, where on the tenth day of the assizes a prisoner is ordered to be imprisoned for one day, the effect of which is that he is discharged immediately.]

He referred to the 75th and 78th sections of the 1 & 2 Vict. c. 110, and to *Thomas v. Hudson*, 14 Mee & W. 353; s. c. 14 Law J. Rep. (N. S.) Exch. 283, and *Watson v. Bodell*, Ibid. 57; s. c. 14 Law J. Rep. (N. S.) Exch. 281.

POLLOCK, C. B. There will be no rule in this case, the matter being quite free from doubt. The first question is, whether it is competent for the defendant to avail himself of this defence under the general issue; and the second question is, whether that defence is good. As to the first point, I think the defendant may give this defence in evidence, even without the statute, by virtue of the rule, which declares that the plea of not guilty in case shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant. But upon that point I need not give any opinion. The 110th section of the 1 & 2 Vict. c. 110, expressly enacts, that in an action against the keeper of any prison for performing the duty of his office in pursuance of the act, he may

plead the general issue and give the act and special matter in evidence. It is argued that a discharge of an insolvent debtor cannot be forthwith and at a future period. Now, the word "future" has reference to the date of the vesting order, and the Insolvent Court has power to discharge a debtor either forthwith, or from a time to be computed from the date of the vesting order. The adjudication has nothing to do with the question. The jailer is protected by the warrant, the operation of which is to be computed from the 7th of January. The jailer is not to determine whether the form of the adjudication is wrong or not. There was a warrant in existence which required him to discharge the prisoner, and he was accordingly authorized to discharge him. It is said that he ought to have taken bail for his appearance, or have had him at the return of the *habeas corpus*. He had, however, no power to take bail, and had he done so he would have been liable to an action, and perhaps to severe damages. Nor could he take him into custody again after he had been discharged. If a peer or member of Parliament is discharged from imprisonment before the return of the *habeas corpus*, or if a party escapes before the day of the return of that writ, he is not in custody, and the writ is spent.

PARKE, B. I entertain no doubt in this case. There are three questions: the first question is, whether the defendant was justified in discharging the debtor; secondly, whether the defence may be given in evidence under the general issue; thirdly, whether the defendant was bound to have the debtor at the return of the writ of *habeas corpus*. As to the first point, it was settled by the case of *Thomas v. Hudson*, that a jailer is protected by his warrant alone, and that he is bound to look at that only, in the same manner as a sheriff is protected by the writ. The question then is, whether this warrant is void. I think it is not void; it is inartificially drawn up, but the meaning is that the prisoner is to be let out forthwith. The mode of effecting this is, indeed, clumsy and ill contrived; but that makes no difference, as the three months had expired before the date of the warrant. If, indeed, the warrant were void, the officer would not be protected. A doubt arose in my mind upon the 76th section, whether the Commissioner had any other jurisdiction than to discharge the prisoner "forthwith;" or in case the prisoner shall be actually in custody, then to discharge him at a certain period, and therefore that the Commissioner had no power, as in the present case the party was not in actual custody, to discharge him at a future period. But it is clear that the legislature intended that a party should be discharged at a future period, although he might not be in actual custody at the time of the adjudication. [His Lordship read the 85th section of the 1 & 2 Vict. c. 110.] Now, taking both the sections together, it is clear that a party may be discharged either forthwith, or at a future period. That was the doubt I at one time entertained as to the construction of the 76th section; but I feel that doubt no longer. The warrant amounts to a clumsy direction to the jailer to discharge the debtor forthwith, and therefore the defendant

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is justified, in the same manner as a sheriff would be, in discharging him. As to the second question, I think the defendant may avail himself of this defence under the general issue by virtue of the 110th section. Thirdly, the defendant was not bound to have the prisoner at the return of the writ. He could bring him up if he were in lawful custody, but he was under no obligation after the discharge of the debtor to search for him and bring him up at the return of the writ.

ALDERSON, B. If it were necessary to say whether this adjudication is wrong or not, I should be disposed to say that the act of parliament had not been properly pursued by the commissioner. But it is a very different question whether the jailer has done his duty. He is to look at the order only, and not to the question whether the order ought to direct the discharge to be at a future period. We must look at the ordering part of this warrant or order, and then we see that as to the detainer of Harvey, the prisoner is to be discharged from the defendant's custody at the period of three months, to be computed from the 7th of January. This is only a periphrastic mode of expression, the effect of which is to discharge the prisoner forthwith, and that course the jailer was bound to take. With respect to the question of pleading, I doubt whether, without the assistance of the act of parliament, the defence in this case could be given in evidence under the general issue. If the order were absolute for the defendant to bring up the body of the debtor, the defendant would have to give an excuse for not obeying the order, and that excuse he would have to plead specially. But if the effect of the order were merely to direct the defendant to bring up the body of the debtor, provided the debtor were in his custody, then there was no breach of duty, and the defence might be given in evidence under the general issue. We need not, however, give any opinion on that point. It is enough to say that in this case there has been an obedience to the order of the Insolvent Court, and the defence may be given in evidence under the general issue.

MARTIN, B., concurred. — *Rule refused.*

JEFFRIES and others v. WILLIAMS.¹

November 15, 1850.

Case for Injury to a Building by undermining — Arrest of Judgment — Averment of Right to Support.

A declaration in case by reversioners stated that certain buildings and closes of land were in the occupation of A and B as tenants to the plaintiffs, the reversion belonging to them. That the defendant so negligently, and without leaving proper support, worked certain mines near and contiguous to the said premises, and dug minerals out of the mines near and contiguous to the said buildings and closes, whereby large portions of the buildings be-

¹ 20 Law J. Rep. (n. s.) Exch. 14.

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came injured, and the ground on which the building stood and the said closes swagged and gave way:—

Held, on motion in arrest of judgment, that the declaration was good: that, as it did not appear that the soil in which the mines were belonged to the defendant, or that the defendant had all the right to get the mines that the owner of the adjoining soil had, the defendant was *prima facie* a wrong-doer, and that it was unnecessary to aver in the declaration that the plaintiffs had a right to have the buildings supported by the soil under which the defendant worked.

CASE by the plaintiffs as reversioners. The declaration stated that certain messuages, buildings and closes of land were in the occupation of J. F., L. M., and others, as tenants to the plaintiffs, the reversion thereof still belonging to the plaintiffs. That the defendant so wrongfully, carelessly, negligently, and improperly, and without leaving any proper or sufficient support in that behalf, worked certain mines under ground *near and contiguous to* (and under) the said premises, the reversion whereof then belonged to the plaintiffs, and dug the minerals out of the said mines near and contiguous to (and under) the said messuages, buildings, and closes of land, whereby the foundations of the said messuages and buildings were then weakened and injured, and in consequence thereof large portions of the said messuages and buildings became prostrate, cracked, injured, and wholly uninhabitable, and the *ground* on which the said messuages and buildings stood and the said *closes* greatly swagged and gave way, and the said messuages and buildings and closes became utterly useless and of no use or benefit to the plaintiffs.

The defendant pleaded not guilty, and other pleas.

At the trial, before Lord Campbell, C. J., at the last Warwickshire Spring Assizes, it appeared that previously to the accruing of the plaintiffs' title, the defendant, who was entitled to the mines under the plaintiffs' houses and land, had excavated the soil underneath the houses of the plaintiffs, but that no damage had been done thereby either to the houses in question or to the surface land. The act of the defendant for which the present action was brought, consisted in his having made an excavation near to but not under the plaintiffs' land, which excavation, in consequence of the support of the plaintiffs' land having been previously weakened by the defendant, occasioned the houses to crack and the surrounding land to sink. The jury found that the defendant had not excavated *under* the land since the plaintiffs had become entitled to the reversion, but they found that the houses had been injured and the soil had sunk in consequence of the excavations having been made adjoining to the plaintiffs' land. A verdict was found for the plaintiffs, with leave to the defendant to move to enter a nonsuit or a verdict.

Whitehurst having, in Michaelmas term last, obtained a rule *nisi* to enter a nonsuit or verdict for the defendant, or for a new trial, and also to arrest the judgment,—

Humfrey and Mellor showed cause, (June 18, 19.) The plaintiffs are entitled to retain the verdict. The defendant was guilty of negligence in law by carelessly excavating close to the plaintiffs' land.

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He violated the legal maxim, *sic utere tuo, ut alienum non lædas*. The question of negligence depends upon the nature of the property and the circumstances of the case. The defendant, by his own act of previously undermining the plaintiffs' land, had rendered it unsafe for himself afterwards to work up close to the plaintiffs' soil. He was aware that one of the consequences of working close to the land of the plaintiffs would be the injury of the plaintiffs' property. In Gale on Easements, p. 225, 1st edit., the law on the subject is thus stated: "It may be suggested that there are cases in which, though the house be modern, damages may be recovered for an injury done to it by digging too near the common boundary. If the owner establishes his right to support for the soil, and the jury should be of opinion that the land would have fallen in, in consequence of the digging, even had no additional weight been imposed by building, the value of the house falling with land might, it seems, be recovered as damage resulting from the principal injury," and in support of that position *Wyatt v. Harrison*, 3 B. & Ad. 871; s. c. 1 Law J. Rep. (N. S.) K. B. 237, is cited.

[PARKE, B. That is an adoption of the law as stated in 2 Roll. Abr. "Trespass," I. pl. 1. But if in such a case the land falls by reason of the house being on it, then the party would not be responsible, unless there were some grant or prescription in the case.]

The plaintiffs had a right by the gift of nature that their land should not be made to fall in. *Harris v. Ryding*, 5 Mee. & W. 60; s. c. 8 Law J. Rep. (N. S.) Exch. 181, is in point. There had been a grant of the minerals under the land, and the defendant removed them in such a negligent manner that the surface of the land fell in. There there existed the natural easement of support for the upper soil from the soil beneath, and the entire removal of the lower strata, however done, if productive of damage by removing the support to which the owner of the surface was entitled, is actionable. Substantially, the plaintiffs complain that their land has been injured by being made to sink, and that the house has been thereby injured incidentally. All the cases on the subject are collected in Gale on Easements, and the principal authorities are *Turberville v. Stampe*, 1 Ld. Raym. 264; *Sutton v. Clarke*, 6 Taunt. 29; *Vaughan v. Menlove*, 3 Bing. N. C. 468; s. c. 6 Law J. Rep. (N. S.) C. P. 92; *Stansell v. Jollard*, 1 Sel. N. P. 444, 8th edit., and *Hilton v. Earl Granville*, 5 Q. B. Rep. 701; s. c. 13 Law J. Rep. (N. S.) Q. B. 193.

Whitehurst, in support of the rule, was stopped by the Court.

PARKE, B. The rule must be absolute to enter a verdict for the defendant as to that part of the declaration which states that the defendant worked the mines *under* the plaintiffs' premises; and for the plaintiffs as to the residue of the declaration in respect of the defendant's not having left sufficient support for the house of the plaintiffs. Mr. Whitehurst will then move to arrest the judgment, the words "and under" being considered as struck out of the declaration, and the question raised in *Wyatt v. Harrison* will come before the Court.

Humfrey and Mellor then showed cause against the rule to arrest the judgment. The words "and under" being now considered as struck out of the declaration, the plaintiffs' case falls within the authority of *Wyatt v. Harrison*, which shows that if the soil of a party falls in, in consequence of the excavations of another, the value of the house which falls may be recovered as consequential damages, provided the soil would have fallen in, in consequence of the digging, even if no additional weight had been imposed by building. Here it sufficiently appears after verdict that the plaintiffs are complaining of an injury to the soil in its natural state by causing it to sink, and that they seek to recover consequential damages for the injury done to the house. It is enough if the plaintiffs state a good title in a defective manner. *Stennel v. Hogg*, 1 Wms. Saund. 220. The plaintiffs were not bound to state that they were entitled to enjoy the soil in its natural state. The declaration states in substance that the soil was injured by being made to sink, and the plaintiffs would have been entitled to recover had the declaration been silent as to the injury to the house.

[PARKE, B. How does the declaration show that the ground would have fallen if the house had not been there?]

The declaration shows that in consequence of the defendant's acts the closes greatly swagged and gave way, and the messuages and closes became utterly valueless.

[ALDERSON, B. That may have been caused by the houses being there.]

It is enough for the plaintiff to show that the soil sank: that supports the declaration. It was not necessary for the plaintiffs to aver that the house did not occasion the swagging of the land. They cited *Dodd v. Holme*, 1 Ad & E. 493; s. c. 3 Nev. & M. 739; *Gale on Easements*, p. 225; *Slingsby v. Barnard*, Rolle, 430; and *Smith v. Martin*, 2 Wms. Saund. 394.

Whitehurst, in support of the rule. The judgment must be arrested. It must be taken on this declaration that the plaintiffs are the owners of the house, and the defendant of the soil, and that the defendant dug the soil in a careful manner, but not in such a manner as to prevent the house from falling. The answer of the defendant is, that the declaration does not show it to have been his duty to prevent the plaintiffs' house from falling.

[PARKE, B. The plaintiffs say that the defendant has no right to make their soil sink, and that the injury to the house is merely stated as consequential damage; and *Wilde v. Minsterley*, 2 Roll. Abr. "Trespass," 1. pl. 1, may be cited in support of that position.]

The law there is not laid down absolutely, but is prefaced by the words "*Mes Semble*." The allegation of negligence is to be considered as struck out of the declaration. He cited *Slingsby v. Barnard*, Rolle, 430; *Trower v. Chadwick*, 3 Bing. N. C. 34; s. c. 6 Law J. Rep. (N. S.) C. P. 47; *Chadwick v. Trower*, 6 Ib. 1, in error; s. c. 8 Law J. Rep. (N. S.) Exch. 286; *Peyton v. The Mayor, &c., of London*, 9 B. & C. 725; s. c. 7 Law J. Rep. K. B. 322; *Brown v. Windsor*, 1 Cr. & J.

20, and *Smith v. Kenrick*, 18 Law J. Rep. (N. S.) C. P. 172. — *Cur. adv. vult.*

The judgment of the Court¹ was now delivered by

PARKE, B. [His Lordship stated the pleadings, and then proceeded.] On the trial, before Lord Campbell, C. J., at Warwick, it was admitted that the last two pleas must be found for the plaintiffs; and the question between the parties arises on the plea of not guilty. It appeared that the six cottages which were in the possession of the plaintiffs' tenants had been seriously injured by the defendant making mines under the cottages near to them, but no mines had been worked under the cottages while the reversion belonged to the plaintiffs. They had ceased to be worked in the time of their father, the former proprietor; but whilst the plaintiffs had the reversion, the defendant had worked one of the veins of coal ten yards and another lower, and one yard from the plaintiffs' soil, and this working the jury found to have been the cause of the damage. There was evidence that the mines were worked in a proper way, according to the practice of miners, and with reference to the interest of the coal-owners, but sufficient props were not placed, or ribs of coal left to support the surface; indeed, there was no mode of working such veins of coal in such a soil so as to make the surface safe, and prevent it from what is termed "swagging." The jury found the plea of not guilty for the plaintiffs, but the Chief Justice reserved the question, whether, under the circumstances, the action could be maintained, and gave leave to move to enter a nonsuit as to the charge of working the mines under the cottages. It is clear that must fail, as no such working was proved while the plaintiffs were entitled to the reversion. And whether the other plea, the third, ought not to have been partially found for the defendant, it is not worth while to inquire.

The residue of the charge is, that the defendant worked the mines *near and contiguous* to the cottages and closes of the plaintiffs. There do not appear to have been any closes except the site of the cottages, but there was no working "contiguous," that is, so near as to touch that site, but there was *near* to the site, and so near that the working in that place and the mining of the coal there caused damage to the cottages: the question, therefore, is, whether the residue of the declaration, that is, that part of the declaration is good in law, and what ought to be the verdict on the plea of not guilty. The allegation is, that the defendant, wrongfully, carelessly, negligently, and improperly, and without leaving any proper or sufficient support in that behalf, both worked the mines and dug and got the minerals out of the mines near to the said messuages and closes, the reversion of which was the plaintiffs', whereby the foundations of the said messuages and buildings were greatly injured, and in consequence thereof large portions of the messuages and buildings fell down and were rendered uninhabitable, and the ground on which the buildings stood

¹ PARKE, B., ALDERSON, B., ROLFE, B., and PLATT, B.

swagged and gave way, and was rendered less valuable, and the plaintiffs were injured in their reversionary interest.

We think this part of the declaration is good. The objection to it is, that there is no allegation that the plaintiffs had any right to have the messuages supported by the soil under which the defendant got the mines; and if it had appeared in the declaration that the soil in which the mines were was the defendant's, or that the defendant had all the right to get the mines which the owner of the adjoining soil had, the objection would have been fatal; because, arguing against a person having the right to the adjoining soil, or claiming under one that had all his rights to interfere with the soil, it would be necessary for the plaintiffs to show a title to a support of the soil, according to the doctrine laid down in *Wyatt v. Harrison*; but if the defendant is not stated in the declaration to have any such right, and is, therefore, *prima facie* a wrong-doer, the declaration, it seems to us, would be sufficient. If a house is *de facto* supported by the soil of a neighbor, this appears to us to be a sufficient title against any one but that neighbor, or one claiming under him, just as one who should prop a house up by a shore resting on his neighbor's ground would have a right of action against a stranger, who, by removing it, caused the house to fall, but not against the neighbor, or one authorized by the neighbor to do so, if he takes it away and causes the same damage. And this explains why there was no allegation of the right to the support of the adjoining soil in the case of *Smith v. Martin*, whereas where the defendant appeared to be the owner of the adjoining soil the declaration was held bad for want of the allegation of such a right as in *Wyatt v. Harrison*, and *Peyton v. The Mayor, &c. of London*. Now, in this case the defendant must be taken to be a wrong-doer, for he is not stated in the declaration to be the occupier or owner of the adjoining land, or to have under him all the rights that he has to mine and dig there; nor can either of these facts be collected by inference from the averment in it; at the most it may be conjectured that the plaintiffs do not mean to dispute that he had some right of mining; although even that is not necessarily to be inferred, as the plaintiffs only allege that the defendant carelessly, (that is, with respect to the plaintiffs' dwelling-houses,) and without having a sufficient and proper support for them and their land, got the minerals and caused the houses to fall, without admitting or denying that they had any right to do what they did.

The declaration being good in this respect, the only question on not guilty was, whether it was proved; and as the defendant did work the mines without taking due care not to do damage to the plaintiffs' houses, and without leaving a sufficient or proper support for them, the plaintiffs are entitled to the verdict. It is not a question whether he conducted himself properly with respect to the owner of the surface if he claims the mines under him, or if he himself was the owner of the surface and the mines, whether he acted carelessly or improperly with regard to his own interest. If he had the soil of the adjoining land himself, and in consequence a right to dig to the extremity of it, so that he left all the support which the plaintiffs'

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soil was entitled to in its natural state, without being weighted by the plaintiffs' houses; or if he had a right to get the mines derived from the owner of the adjoining land, with all his rights of excavating and getting the minerals which he had derived under the owner of both the plaintiffs' land and the land adjoining without leaving a sufficient support to the surface, with or without houses upon it, he should have confessed the allegations in the declaration, including the insufficiency of the support, and excused them. Whether the defendant really had any justification for so getting the minerals, and leaving no sufficient support for the plaintiffs' land and buildings, does not appear upon my Lord Chief Justice's notes. Upon these pleadings the plaintiffs were, in our opinion, clearly entitled to recover; we think, therefore, that the rule must be discharged.

Rule to arrest the judgment discharged; and rule absolute to enter the verdict for the defendant as to part, and for the plaintiffs as to the residue of the declaration.

NYSSSEN V. RUYSENAERS.¹

November 23, 1850.

Bail, Deposit in Lieu of — Payment to Plaintiff — 7 & 8 Geo. 4, c. 71, s. 2.

Where a defendant is arrested under 1 & 2 Vict. c. 110, and is released on depositing with the sheriff the amount indorsed upon the writ, with 10*l.* for costs, which sums are afterwards paid into Court, the plaintiff is entitled to have the money paid out of Court to him (subject to taxation) if the defendant neglects to pay an additional 10*l.* into Court, pursuant to 7 & 8 Geo. 4, c. 71, s. 2.

THE defendant, having been arrested by a Judge's order, under 1 & 2 Vict. c. 110, had deposited with the sheriff of Middlesex the sum of 30*l.*, in lieu of bail, being the amount for which the writ was indorsed, and 10*l.* for costs, pursuant to 43 Geo. 3, c. 46, s. 2, but had taken no other step. The sheriff paid the amount into Court, and a rule was obtained by the plaintiff, calling on the defendant to show cause why the sum of 30*l.* deposited by the defendant with the sheriff of Middlesex on his arrest, and since paid into Court, should not be paid out to the plaintiff, or his attorneys, subject to such deduction from the sum of 10*l.* parcel thereof, as, on taxation by the Master of the plaintiff's costs of this action, should be deemed reasonable; against which, —

Barnard now showed cause. The question is, whether the provisions of the 7 & 8 Geo. 4, c. 71, s. 2, apply, by which the defendant may pay a further sum of 10*l.* into Court for costs, in lieu of putting in and perfecting special bail in the action. The arrest is now a collateral proceeding; and it was not intended to compel the

¹ 20 LAW J. REP. (N. S.) EXCH. 33.

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defendant to give this extra security, or it would have been referred to in the 1 & 2 Vict. c. 110.

[ALDERSON, B. The 4th section of that act says, that "all subsequent proceedings as to the putting in or perfecting special bail, or of making deposit and payment of money into Court instead of putting in and perfecting special bail, shall be according to the like practice of the Superior Courts, or as near thereto as the circumstances of the case will admit." We enforce it, therefore, in the same way.]

Ministry, contra, was not called upon.

Per Curiam.¹ The rule will be absolute, unless the other 10*l.* is paid into Court. — *Rule absolute*.

DERRY, public Officer of the Devonshire and Cornwall Banking Company, v. TOLL.²

November 4, 1850.

Usury — Pleading — Certainty.

Debt by the public officer of a banking copartnership for work and labor, commission, money lent, interest, and on an account stated. Fourth plea, as to 390*l.* 13*s.*, parcel, &c., that it was corruptly agreed between the defendant and the banking copartnership, that they should lend to him from time to time such sums as he should require, by paying certain checks of the defendant, upon the terms that while the said copartnership should forbear to demand payment of the sums so lent, they should charge the defendant partly for interest and partly under the shift and cheivance of commission for their work and labor, more than 5*l.* per cent., to wit, 10*l.* per cent., and that in pursuance of such agreement, the company did lend to the defendant divers sums, and did charge a large sum, partly by way of interest and partly by way of shift and cheivance of commission, and exceeding the rate of 5*l.* per cent. The plea then identified the sum of 390*l.* 13*s.*, parcel, &c. The fifth plea was similar, but addressed only to the commission and interest: —

Held, upon special demurrer, that the usurious agreement was pleaded with sufficient certainty, and that it was sufficient to state enough to make the agreement illegal within the 12 Ann. stat. 2, c. 16, without averring that the contract was prior to the 2 & 3 Vict. c. 37, or that it was within the exception of that act as relating to land.

The case of *Washbourn v. Burrows*, 1 Exch. R. 107, affirmed.

DEBT by the plaintiff, as public officer of the Devonshire and Cornwall Banking Company, for work and labor, commission, money lent, money paid, interest, and upon an account stated.

Fourth plea, as to 390*l.* 13*s.* parcel, &c., that before the accruing of the causes of action, &c., to wit, &c., it was corruptly and against the form of the statute agreed by and between the defendant and the said copartnership, that the said copartnership should then and thenceforth, and from time to time, as he should require, lend to him certain sums of money of such amount respectively as he should require, but so that all the said sums so to be lent by them to the defendant should not, in the whole, exceed 1000*l.*, by paying out of

¹ POLLOCK, C. B., PARKE, B. ALDERSON, B., and PLATT, B.

² 20 LAW J. Rep. (N. S.) Exch. 33.

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their own moneys, and over and above such moneys of the defendant as they might hold, to such persons as should be the lawful holders of, and should present to them checks signed by the defendant, so as that the amount of the said checks so to be paid out of their proper moneys should not exceed the said sum of 1000*l.*, upon certain terms, viz., that the said copartnership should forbear and give to the defendant day and time for the repayment of all the said sums, to wit, until they, the said copartnership, should demand such repayment, and that for and in respect of such forbearance, the defendant should pay to them certain interest and sums of money to be charged by them to him, partly under the name of interest, and partly under the name of shift and chevisance of commission, which should be charged to the defendant by the said copartnership in respect of and as the pretended price, value, and remuneration of and for certain work that might or should be thereafter done by the said copartnership for the defendant at a rate altogether exceeding the rate of 5*l.* for the forbearance of every 100*l.* for a year, to wit, at the rate of 10*l.* for the forbearance of every 100*l.* for a year; and afterwards and under and according to the said corrupt and unlawful agreement, and at divers times after the making thereof, until and at the commencement of this suit, and the accruing of the causes of action, &c., the said copartnership did lend, in manner aforesaid, to the defendant such sums as amounted to a certain sum, not exceeding 1000*l.*, to wit, the sum of 300*l.*, and that they did charge to him such illegal and excessive interest in manner as aforesaid, partly under the name of interest, and partly under the said name of shift and chevisance of commission as aforesaid, upon the said sum so lent and advanced to him, that is to say, interest at the rate of 10*l.* for the forbearance of every 100*l.* for a year, upon the sums so advanced and lent as aforesaid, from the respective times when the same were so lent until and at the commencement of this suit. The plea then went on to identify the sum of 390*l.* 13*s.*, as parcel of the moneys so claimed in the declaration for money paid and lent, work and labor, and interest, but not particularizing the respective amounts, and concluded with a verification.

The fifth plea was similar to the fourth, except that it was pleaded only to the commission and interest, and alleged that there was an agreement between the copartnership and the defendant for interest at 15*l.* per cent., as consisting of 5*l.* per cent. for interest, and 10*l.* per cent. which was to be charged under the color of commission.

Special demurrers to these pleas and joinders therein.

Taprell,¹ in support of the demurrers. The fourth plea is insufficient, as it does not state with precision how much money was lent, and how much commission was charged, so that the Court may see whether the agreement was usurious. A plea in bar must be more specific than a declaration or information for usury, because the facts lie within the defendant's own knowledge — 1 Wms. Saund, 205 a,

¹ May 27, before POLLOCK, C. B., PARKE, B., ALDERSON, B., and PLATT, B.

295 b, 1 Hawk. P. C. 248, s. 24, Bac. Abr. tit. "Usury," K. The defendant should show in what particulars he assails the agreement — *Hill v. Montagu*, 2 M. & S. 377; *Robson v. Fallows*, 3 Bing. N. C. 392; s. c. 6 Law J. Rep. (N. s.) C. P. 105. It is not averred that the plaintiffs lent their own money for the defendant's checks, nor are the times when the advances were made stated. *Partridge v. Coates*, 1 Car. & P. 434; *Fox v. Keeling*, 2 Ad. & E. 670; s. c. 4 Law J. Rep. (N. s.) K. B. 104. The plea is also bad, because it does not show that the contract was entered into prior to the 2 & 3 Vict. c. 37, or, if afterwards, that it was within the exception of that statute as relating to land. The presumption is in favor of the legality of the contract — *Lewis v. Davison*, 4 Mee. & W. 654; s. c. 8 Law J. Rep. (N. s.) Exch. 78. The authorities have only established that in a declaration for penalties it is sufficient to bring the case within the 12 Anne, stat. 2, c. 16 — *Thibault v. Gibson*, 12 Ibid. 88; s. c. 13 Law J. Rep. (N. s.) Exch. 2. In *Turquand v. Mosedon*, 7 Ibid. 504; s. c. 10 Law J. Rep. (N. s.) Exch. 196, a replication setting up an usurious contract was held bad, for not alleging that it was made before the 7 Will. 4, & 1 Vict. c. 80, and the 2 & 3 Vict. c. 37, came into operation, or that it was excepted from the provisions of those statutes; and the allegation of the contract being against the form of the statute, is insufficient — *Holt v. Miers*, 5 Ibid. 168; s. c. 8 Law J. Rep. (N. s.) Exch. 233; *Downes v. Green*, 12 Ibid. 481; s. c. 13 Law J. Rep. (N. s.) Exch. 159. *Washbourn v. Burrows*, 1 Exch. Rep. 107; s. c. 16 Law J. Rep. (N. s.) Exch. 266, is not an authority on this point, because the plea there set up what was *prima facie* a contract as to an interest in land. The fifth plea is also bad, because it does not state that loans were made, and so forborne for usurious interest.

Bovill, contra. The fourth plea is sufficient, for enough is stated to show that the contract was invalid for usury. It is part of the very shift and contrivance between the parties, that the exact amount of the interest and commission respectively is not to be ascertained. The whole arrangement was colorable, and is so pleaded, which was not done in *Downes v. Green*. The times and amounts need not be specified, the advances being stated to have been according to the contract. *Turquand v. Mosedon* is very shortly reported, and no reasons given in the judgment. *Thibault v. Gibson* lays down the general principle within which this plea falls, viz., that an exception, whether in the statute itself, or in a subsequent statute, is to be pleaded by the party who relies on it. *Washbourn v. Burrows* recognizes this rule. The contract there was as to crops of grass then growing on certain lands, which did not necessarily negative that they were personal chattels, for the owner might sever them before they were delivered. The judgment rests upon the general principle. The fifth plea is also certain enough, under the circumstances of this illegal agreement. — *Cur. adv. vult.*

Judgment was now delivered by

Derry, &c. v. Toll.

POLLOCK, C. B. This was an action for work and labor, commission, money lent, money paid, interest, and on an account stated. To this declaration the defendant pleaded several pleas. By the fourth plea he sets up an agreement by the copartnership, represented by the plaintiff, that they should cash the defendant's checks to any amount not exceeding 1000*l.*, and that, in consideration of their so doing, the defendant should pay them interest at a rate exceeding 5*l.* per cent. per annum, *i. e.* 10*l.* per cent., partly under the name of commission, partly under the name of interest. The plea then avers that the copartnership did cash the defendant's checks, and did charge him such excessive interest, and that the sums so paid in cashing the defendant's checks are the moneys sought to be recovered as money paid and lent, and that the sums sought to be recovered for work and labor are so charged for the commission stipulated for in the said agreement, and the interest sought to be recovered is the said excessive interest. The fifth plea is substantially the same, except that it is pleaded only to so much of the plaintiff's demand as relates to interest and commission, and states the agreement to have been a corrupt agreement for interest at 15*l.* per cent., *i. e.* 5*l.* per cent. under the name of interest, and 10*l.* per cent. under color of being charged for commission. To these pleas there are special demurrers.

It was contended for the plaintiff that the agreement was not set out with sufficient certainty; that it ought to have been shown how much precisely of the excess beyond 5*l.* per cent. was for usurious interest, and how much for commission; but the answer to this is, that the contract is stated with all the certainty of which it is capable. When parties enter into a usurious contract of this nature, it is studiously done in such a manner as to mix up the interest and commission in one charge, so as to make it impossible to tell how much is attributable to the one head, and how much to the other. The defendant has shown exactly what the bargain was, and has stated that the agreement for the gross sum to be paid for interest and commission was done colorably, so as to enable the partnership to get above 5*l.* per cent. This, we think, is all which the defendant could be called on to do. But the main point relied on by the plaintiff was, that the plea was bad for not having stated either that the contract was entered into previously to the 2 & 3 Vict. c. 37, or if subsequently, then that it related to land. But this objection cannot be sustained. The case is governed by *Washbourn v. Burrows*. What was there decided was, that a party setting up usury as a defence need only state sufficient to bring the case within the operation of the statute of Anne, and that is certainly done here. That statute is still in force. If the opposite party means to contend that the case is one which is taken out of the operation of the statute of Anne by the statute of Victoria, the *onus*, then, is on him to do so. This is the clear result of our decision in *Washbourn v. Burrows*, and which, therefore, governs the present case; and so judgment must, in this case, be for the defendant. — *Judgment for the defendant.*

 Branford v. Freeman.

BRANFORD v. FREEMAN.¹

November 7, 1850.

Practice — Trial — Right to begin.

A new trial will not be granted because a judge has wrongly ruled at *nisi prius* as to which party must begin, unless such ruling did clear and manifest injustice.

The case of *Edwards v. Matthews*, 11 Jurist, 398, affirmed, and the report of the case *Huckman v. Fernie*, in 3 M. & W. 505, corrected.

ASSUMPSIT, by the accommodation acceptor of two bills for 200*l.* each against the defendant as drawer, upon his promise to indemnify the plaintiff; with a count for 400*l.* money paid to the use of the defendant.

Plea, averring the identity of the 400*l.* in the third count with the sums of 200*l.* in the first and second counts, and that they constituted one and the same debt; and that the defendant entered into a composition deed with the plaintiff and his other creditors, whereby they covenanted not to sue him for any debts then due to them; and that, after the payment of the two bills by the plaintiff, the deed was executed by the plaintiff.

Replication, that the said deed was executed by the plaintiff before the said bills were paid by him, and not afterwards. Issue thereon.

At the trial, before Alderson, B., at the Norfolk Summer Assizes, 1850, the counsel for the plaintiff contended that the *onus* of proof was upon the defendant, and that he ought therefore to begin; and the learned Baron having so ruled, a witness was called, on behalf of the defendant, who proved that the deed was executed at a period considerably after the first bill became due, but whilst the second was, as appeared from the declaration, still running; and therefore a verdict was found for the plaintiff for 200*l.* damages, being the amount of the second bill.

Couch now moved for a new trial. The plaintiff was bound to begin, as the affirmative of the issue was substantially upon him, and the time when he, as acceptor, paid the holder of the bills, was a fact peculiarly within his knowledge.

[ALDERSON, B. You should have stood upon your right, and called no witnesses. I should then have been compelled to direct the jury, and, if I had put the wrong point to them, you could have moved for a new trial; but you took your chance, and called a witness who proved the case against you.]

[PARKE, B. In *Edwards v. Matthews*, 16 Law J. Rep. (N. S.) Exch. 291, this Court held that a wrong ruling as to the right to begin was not of itself a ground for a new trial.]

In *Doe d. Bather v. Brayne*, 5 Com. B. Rep. 655; s. c. 17 Law J. Rep. (N. S.) C. P. 127, the Court of Common Pleas declined to adopt that as a principle. That was an ejectment by a devisee; and the defendant, in order to begin, offered to admit the death of the testator and the execution of the will, and that the plaintiff would be entitled

¹ 20 Law J. Rep. (N. S.) Exch. 36. 14 Jur. 987.

Branford v. Freeman.

to recover unless a subsequent will was proved. The Judge allowed the defendant to begin, but the Court set aside the verdict.

[POLLOCK, C. B. There the right to begin was a matter of the greatest importance.]

These motions are usually made by the party who seeks the right to begin; but in this case the defendant was desirous of not beginning, and the *onus* of proof was thrown upon the wrong party.

POLLOCK, C. B. I adhere to the decision in *Edwards v. Matthews*, where the Court, consisting of my brothers Parke, Rolfe, Platt, and myself, after time taken to deliberate, delivered the judgment, in which I said: "It appears that the rule adopted in this Court is, that the plaintiff or defendant having been called on to begin, when proof of the issue lay on his adversary, is not a sufficient ground for a new trial, unless it is manifest that the course of justice has been thereby interfered with, and some substantial injury effected at the trial of the cause;" and I then added, "I own my impression at one time was that a miscarriage as to who should begin was so important a matter, and might, in many instances, interfere so much with the course of justice, that we ought always to interfere and correct it. But, on referring to the judgment of the Court in the cases to which I have alluded, we must now take it as settled that the question, whether any injury has been done by the erroneous ruling of the Judge at *Nisi Prius*, is involved in the question of the propriety of granting a new trial for it. In the present case, there has been no injury done. The trial was of an issue directed for the purpose of informing the conscience of the Court; and on looking at all the evidence, we think the verdict is right, and consequently ought not to be disturbed." So I think no injury has been done in this case. The result must have been the same had the plaintiff begun.

PARKE, B. I am of the same opinion. The rule in this Court is, that for a mere error as to beginning, as deduced from the pleadings, no new trial will be granted, but only if the error has led to substantial injustice. One of the first cases on this subject was *Huckman v. Fernie*, 3 Mee. & W. 505; s. c. 7 Law J. Rep. (N. S.) Exch. 163, where Lord Abinger is reported to have said, "I cannot say we should interfere in a very doubtful case; but if the decision of the Judge were clearly and manifestly wrong, the Court would interfere to set it right." Now, that is a misrepresentation; and I have corrected it in my own hand in the copy of Meeson & Welsby which is in this Court. What Lord Abinger said was, that the order of beginning is a matter for the disposal of the Judge at *Nisi Prius*, but if his ruling did clear and manifest wrong, the Court would interfere to set it right; and that view of his language is confirmed by the note appended to the report of *Edwards v. Matthews*, in the 11 Jur. 398.¹ By that rule I shall be prepared to abide, for it would be extremely hard

¹ The mistake is also corrected by ALDERSON, B., at the end of the report of *Booth v. Mills*, 15 Law J. Rep. (N. S.) Exch. 355.

Sims & others v. Robert Brutton & John Clipperton.

to grant a new trial on such a ground, where substantial justice has been done between the parties. Even, therefore, if my brother Alderson was wrong in holding that the burden of proof lay in the first instance on the defendant, (which I by no means admit, but give no positive opinion upon it,) still, the moment the witness was examined, the result of the case was clear.

ALDERSON, ¹B., concurred, — adding, that he was of the same opinion as at the trial, that the defendant ought to have begun. — *Rule refused.*¹

SIMS and others, Executors of THOMAS ABERNETHIE, v. ROBERT BRUTTON and JOHN CLIPPERTON.²

November 18, 1850.

Attorney — Partnership, Liability of — Receipt of Mortgage Money — Limitations, Statute of.

In 1832 A employed B & C, then in partnership as attorneys, to lay out 500*l.* on mortgage. It was invested accordingly on a mortgage to D. D subsequently sold the property, subject to the mortgage, and the purchaser shortly afterwards paid the 500*l.* to C, who, however, did not inform either B, his partner, or A of such receipt, and again lent the purchaser 300*l.*, and continued to receive the interest thereon. The partnership was dissolved in 1838; but both before and after the dissolution, and after the death of A, which took place in 1840, interest was paid as upon a mortgage of 500*l.* to A and his representatives up to 1848 by C. In 1846 the 300*l.* was paid to C, and the mortgage deed was given up by C, but no reconveyance was ever executed. Neither A nor his representatives had any knowledge of these facts until 1848. Entries had been made by C in the partnership books of the receipts and payments, but B had no knowledge of the transaction subsequent to the original advance of the 500*l.* : —

Held, in an action by the executors of A against B and C, that the Statute of Limitations was a bar to the action.

And, *semble*, that B was not liable for these acts of C, as they were not within the scope of his partnership authority.

ASSUMPSIT by the plaintiffs, as executors of Thomas Abernethie. The first count was for money lent, money had and received, interest,

¹ In *Davis v. Mason*, 4 Pick. 156, which was trespass *quare clausum*, with a plea of soil and freehold in the defendant, and replication traversing the same, on which issue was joined; and the defendant claimed the right to open and close, which was denied him, the Supreme Court granted a new trial, although they said, "From the view of the case, which we have from the report, we think that the verdict is right." This decision was on the ground that on the pleadings as they stood, the opening and close was a matter of right, and not discretionary. See *Sawyer v. Merrill*, 6 Pick. 480.

On the other hand, the English decisions

seem to regard the question as one of discretion, and hold, in accordance with *Bransford v. Freeman*, that unless wrong has clearly been done, or if the matter be at all doubtful, the Court will not interfere. Pollock, C. B., in *Geach v. Ingall*, 14 Mees. & Welsb. 97; s. c. 15 Law J. Rep. (n. s.) Exch. 37. See also *Booth v. Millas*, 15 Mees. & Welsb. 669; *Ashby v. Bates*, Id. 587; s. c. 15 Law J. Rep. (n. s.) Exch. 349, 354. Courts seem more inclined to grant new trials, on motion of a party from whom the right to open and close has been wrongfully withheld, than on the application of one on whom the *onus* of commencing has been improperly cast.

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and on an account stated, laying the promise to the deceased. The second count was similar, laying the promise to the executors. The third count was for money had and received to the use of the plaintiffs, as executors, and for interest, and on an account stated with them, as executors.

The defendant Brutton pleaded non assumpsit, and the Statute of Limitations. The other defendant allowed judgment to go by default. By consent, the following case was stated.

In March, 1832, the defendants were acting as the attorneys and solicitors of the said Thomas Abernethie, and were then practising in partnership together as attorneys and solicitors at their offices, in New Broad Street, in the city of London.

In March, 1832, the said T. Abernethie applied to the defendant Brutton, to obtain for him an investment of 500*l.* on mortgage of good security, and Brutton informed him he had procured such investment, and he remitted, in March, 1832, to the defendant Brutton, (which was paid into his own hands,) the sum of 500*l.*, to be, by them, the said Brutton and Clipperton, as the attorneys and solicitors of the said T. Abernethie, invested on mortgage.

The said sum of 500*l.* was paid by the said Brutton into Messrs. Whitmore & Co.'s banking-house in March, 1832, and placed to the joint account of the defendants; and the said sum of 500*l.* was lent by them, pursuant to the said retainer, to one John Henry Lane, for the said T. Abernethie, on mortgage of certain premises at Camden town, in the county of Middlesex. The mortgage deed was dated the 8th of March, 1832, and was in the usual form; and was executed by the said J. H. Lane, to secure the repayment of the 500*l.* The defendants retained possession of the deed. The property was afterwards sold, subject to the mortgage, to Henry Handford.

On the 16th of September, 1834, being after the said sale, the said H. Handford paid into the hands of the defendant Clipperton, at the office of the defendants, the said sum of 500*l.*, with the interest due thereon, but without the actual knowledge of the defendant Brutton. The deed was given up by the defendant J. Clipperton, to the said H. Handford, but no receipt was endorsed thereon, nor was any reconveyance, or deed, or receipt signed or executed by the said T. Abernethie, who was not informed that the said sum had been paid.

On the 19th of December, in the same year, the said H. Handford applied to the defendant Clipperton, for a return of 300*l.*, part of the 500*l.* he had so paid off, who, without the actual knowledge of the defendant Brutton, returned to the said H. Handford 300*l.*, and received back the said mortgage deed, and no part of the said 500*l.* was paid to the said T. Abernethie.

When the said sum of 500*l.* was paid, in the year 1832, into the banking-house of Messrs. Whitmore & Co., the bankers of the said defendants, an entry was made by the defendant Clipperton, in the books of the said defendants, giving credit to the said T. Abernethie, for the said sum of 500*l.* so received, as aforesaid. When the said sum of 500*l.* was lent to the said J. H. Lane, as aforesaid, an entry was, in like manner, made by the defendant Clipperton, in the said books of

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the said defendants, debiting the said T. Abernethie with the said sum of 500*l.* so lent; and similar entries were made at the time of the payment of the 500*l.* and the return of the 300*l.*, so that the books of the defendants showed 200*l.* remaining to the credit of the said T. Abernethie. Interest, at first, on the 500*l.* mortgage, and then upon the 300*l.* was regularly paid into the hands of the defendant Clipperton, by H. Handford; and, until the dissolution of the partnership of the defendants, hereinafter mentioned, entries were made by the defendant Clipperton, in the books of the defendants, giving credit to the said T. Abernethie for the interest on the 500*l.*, and debiting him in like manner with the interest thereon, paid to Charles Edward Cox, as hereinafter mentioned.

The partnership between the defendants was dissolved on the 30th of July, 1838, and such dissolution was advertised in the London Gazette of the 31st of July, 1838; the fact of such dissolution was also known, at the time it took place, to John Brutton, one of the plaintiffs in this action, but was unknown to the said C. E. Cox, who was the agent to the said T. Abernethie, who was a colonel in the Royal Marines. The interest on the full sum of 500*l.* was regularly paid to the said C. E. Cox, by the defendant Clipperton, and, up to the dissolution of partnership, by checks drawn by the defendants on their bankers; and, after the dissolution, it was paid by the defendant Clipperton, sometimes in cash and sometimes by checks on his own banker; but the said C. E. Fox was not aware of the dissolution of the partnership, or under what circumstances the money was paid, except that he knew it was interest on mortgage, but who was responsible for such payment he was wholly ignorant. In some of the receipts, after the death of T. Abernethie, the money was described as interest on mortgage. The said T. Abernethie died on the 18th of May, 1840.

On the 19th of December, 1846, the said H. Handford paid into the hands of the defendant Clipperton the said sum of 300*l.*, with interest due thereon, up to that day. The deed of mortgage was given up by the defendant Clipperton, to the said H. Handford, but no receipt was indorsed thereon, nor was any reconveyance, or deed, or receipt signed or executed by the plaintiffs, or any of them. The plaintiffs were not informed that the said sum had been so paid. The defendant Brutton was altogether ignorant of the said receipts and payments, subsequent to the investment of the said 500*l.*, until 1849, except so far as the entries aforesaid, in the said partnership books, may be construed as notice of such receipts and payments. It was not until the year 1848 that the plaintiffs discovered that the mortgage money had been repaid.

The Court were to draw any inferences which a jury ought to draw from the above facts. The question for the opinion of the Court was, whether the defendants were liable to the payment of the said sums of 500*l.*, or 300*l.*, or 200*l.*, or any or what part thereof.

Unthank, for the plaintiffs.¹ The action was commenced on the

¹ November 18, before POLLOCK, C. B., PARKE, B., ALDERSON, B., and PLATT, B.

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3d of February, 1849, and the plaintiffs seek to make the defendants liable for the whole sum. It was originally paid into the hands of the defendant Brutton. No imputation whatever is cast upon him, but he must be answerable for the acts of his partner.

[PARKE, B. Mr. Brutton performed his duty by investing it on mortgage. How do you create any subsequent duty?]

Since the decision of *Wilkinson v. Candlish*, 19 Law J. Rep. (N. S.) Exch. 166, it cannot be contended that the attorney had any authority to receive the mortgage-money; but here the defendant Clipperton professed to receive it as the agent of Col. Abernethie, and the entries gave the information to the defendant Brutton. This assumption of being agent is ratified by the principal, and the action will then lie against both.

[PARKE, B. It might be adopted as against Clipperton, but what evidence is there of the partnership being bound?]

Brutton had either knowledge or means of knowledge from the entries. The money is received at the place of business by one partner assuming to be agent for Colonel Abernethie. There are subsequent payments of interest.

[PARKE, B. Not as interest due from the firm, but as interest on the mortgage. Colonel Abernethie imagined the mortgage was still in existence.]

The adoption may be at any time.

[PARKE, B. Must there not be a demand before action?]

It is apprehended not. *Lilley v. Hays*, 5 Ad. & E. 548; s. c. 6 Law J. Rep. (N. S.) K. B. 5.

[PARKE, B. referred to *Scott v. Porcher*, 3 Mer. 652.]

The transaction was within the scope of the partnership, and the subsequent conduct might have been evidence for the jury that the defendant Brutton had recognized it in point of law. There would be a title by relation under these circumstances. *Tharpe v. Stallwood*, 5 Man. & G. 760; s. c. 12 Law J. Rep. (N. S.) C. P. 241.

Hugh Hill, contra. The pleadings dispose of the question before the Court. The first count states a receipt to the use of the deceased, and a promise to him. None such is proved. Then the Statute of Limitations is a complete answer as to Brutton. That runs from the time of the accrual of the cause of action, not from its discovery. *Blair v. Bromley*, 5 Hare, 542; s. c. 16 Law J. Rep. (N. S.) Chanc. 495. (He was then stopped by the Court.)

Unthank replied.

POLLOCK, C. B. The defendants are entitled to our judgment. The Statute of Limitations is an answer as to the defendant Brutton, and being a contract, the whole fails. The partnership was dissolved in 1838, and since that, Brutton has had nothing to do with the matter. But on the broader and more general ground, I am of opinion that the action is not maintainable. The duty of the attorneys was completed by the first investment, and they had no

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authority to receive the repayment of the mortgage money. Then, the payments to Clipperton could not make Brutton answerable. It was no partnership transaction at all, but wholly unauthorized, and it was never recognized by the partnership as such.

PARKE, B. The first ground is enough to dispose of the case. It was perfectly clear there was no part payment to bar the statute. It was never paid as interest upon principal due from them to Colonel Abernethie. I intimate, however, no disagreement with the Lord Chief Baron as to the other point, because it was no part of the business of the firm as solicitors to receive the mortgage money. It is not so found in the case as a fact, and *Wilkinson v. Candlish* shows that there is no such authority in law. Whether Clipperton might be liable upon these facts, I am not called upon to decide.

ALDERSON, B. I am of the same opinion. The Statute of Limitations is clearly a good defence. I also agree that there is no reason to doubt the view expressed by the Lord Chief Baron. Brutton can only be liable for the acts of Clipperton in the character of his partner; but this was wholly beyond his authority and duty. It would have been different if Clipperton had prepared a re-conveyance and obtained the signature of Colonel Abernethie. Nor was there even knowledge afterwards, for the entries would only be admissible as evidence of knowledge; but the case expressly finds the contrary.

PLATT, B. All the payments were paid and received as interest on money out on mortgage. — *Judgment for the defendants.*

PELL v. DAUBNEY.¹

December 6, 1850.

Witness in Civil Suit — Subpoena — Action for Expenses — Loss of Time.

A party served with a subpoena in a civil action, receiving a sum of money therewith, and making no further demand, may maintain an action, against the party on whose behalf he has been subpoenaed, for additional expenses incurred by him in attending the trial, but not for loss of time; *semble*,

DEBT for work, journeys and attendances by the plaintiff as a witness and for money paid.

Plea — Never indebted.

At the trial, before Platt, B., at the Northamptonshire Summer Assizes, it appeared that the action was brought to recover the sum of 46*l.* 14*s.* on account of attendances, journeys, and expenses incurred by the plaintiff in attending the trial of a cause at West-

¹ 20 Law J. Rep. (N. S.) Exch. 44.

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minster, under a *subpœna duces tecum*, on behalf of the plaintiff Daubney in a case of *Daubney v. Phipps*. The charges made by the present plaintiff were 2*l.* 2*s.* a day during his attendances at the trial, 1*l.* 1*s.* a day for his expenses, and 1*s.* 3*d.* per mile for his travelling expenses. The plaintiff had been paid 5*l.* on the subpœna being served upon him, and did not demand more.

The defendant's case was, that the plaintiff had not given his attendance in the character of a witness during the whole of the time in respect of which he claimed to recover; but no objection was made to the plaintiff's case on the ground that a witness who is subpœnaed is not entitled to remuneration for his expenses. The Judge directed the jury that if the plaintiff came to town as a witness he would be entitled to be paid his expenses, and he left it to the jury to say whether the plaintiff had attended in town as many days as he had by his evidence attempted to prove. The jury found a verdict for the plaintiff, damages 9*l.* 19*s.* in respect of the expenses, excluding any compensation for loss of time.

Whitehurst having obtained a rule *nisi* for a new trial on the ground of misdirection, and of the verdict being perverse, —

Macaulay, *Mellor*, and *Field* showed cause. The objection was never made at the trial that there was no implied contract on the part of the defendant to pay the plaintiff for his expenses; but the whole dispute was, whether he had attended in the character of a witness; and even if the law were that no such contract does exist, it is not now open to the defendant to object. Had the objection been made at the trial, it is possible an express contract might have been proved. To contest the right of a witness to his expenses, is most unusual and at variance with all the authorities. Questions have arisen as to the right of remuneration for loss of time, but the expenses have always been recognized as a claim. *Collins v. Godefroy*, 1 B. & Ad. 905; s. c. 9 Law J. Rep. K. B. 158. In *Robins v. Bridge*, 3 Mee. & W. 114; s. c. 7 Law J. Rep. (N. S.) Exch. 49, where this Court decided that the attorney was not liable, it was never questioned that the party in the cause was liable. This is in accordance with many other cases, as *Hallet v. Mears*, 13 East, 15. *Goodwin v. West*, Cro. Car. 522, 540. *Amey v. Long*, 1 Camp. 16, and 180 a. *Bental v. Sydney*, 10 Ad. & E. 162; s. c. 9 Law J. Rep. (N. S.) Q. B. 150. *Willis v. Pekham*, 1 B. & B. 515.

Whitehurst and *Hayes*, in support of the rule. The Judge misdirected the jury, for a witness cannot maintain an action for his expenses of attending a trial unless he has made a special contract. There is no difference between recovering for loss of time and for expenses.

[PARKE, B. In *Robins v. Bridge*, it was decided that an attorney in a cause is not liable to a witness whom he has subpœnaed for the expenses of the witness. There a distinction was taken between the case of where the attorney was liable and where he was not. Why

discuss that question, if, according to the present argument, no one was liable? A witness is not bound to put himself to expense to support a private right. In criminal cases, a witness is bound to attend on public grounds.]

It is submitted that there is no distinction between the right of a witness in a civil and a criminal proceeding.

[PARKE, B. Yes, there is. In a civil case a contract with the witness is implied by serving him with a subpoena. Is there not an implied contract that the witness shall not be bound to defray his own expenses? A party who serves a subpoena upon a person may be considered to say, "Go to the trial, and I will pay your expenses either now or at some future time."]

In *Goodwin v. West* there was a special contract.

[PLATT, B. Is not the serving a subpoena a contract?]

[PARKE, B. It is understood that a witness is to sacrifice his time, but he is not to be put to expenses.]

Newton v. Harland, 1 Sco. N. R. 502; s. c. 10 Law J. Rep. (N. S.) C. P. 11, supports the defendant's view.

[PARKE, B. The giving a subpoena is a common law contract under a sort of regulation.]

Willis v. Peckham shows that a witness attending under a subpoena is not entitled to a compensation for his loss of time. He referred to *Vansandau v. Browne*, 9 Bing. 402; s. c. 2 Law J. Rep. (N. S.) C. P. 34.

PARKE, B. This rule must be discharged, for it now appears to us that this objection was not taken at the trial, and therefore it would be unjust towards the other side to grant a new trial. The cause was conducted irrespectively of this point, and had the defect been pointed out it might perhaps have been supplied at the trial. We must not, therefore, decide the abstract question whether the plaintiff in this case is entitled to maintain an action for his expenses. My own opinion is, that the plaintiff is entitled to recover, and that he may maintain an action for his expenses, even although no express contract be proved to have been made between the parties. On that point, however, I need not deliver any opinion. If a witness in a civil action goes to an assize town without his expenses being paid or tendered or asked for, there is some evidence for the jury of a mutual understanding that if he goes he is to be paid his expenses.

ALDERSON, B. I am of the same opinion. I think the plaintiff in the present case was entitled to maintain the action, and that there was some evidence in support of his claim. The question is, whether there must be an express contract, or whether an implied one arises out of the circumstances. I think a contract in this case may be implied. One party received a benefit, and it must have been understood between them that the party conferring it was to receive compensation. If one party goes to another, and by a subpoena requests

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him to attend a trial, it being known personally that the party requested may refuse to attend unless his expenses are paid, and the latter, without saying any thing, goes to the trial, he certainly does so upon the faith that he will be paid. That is the reasonable conclusion to be drawn by the jury from the facts, and they would be authorized to find that the party was promised a reasonable remuneration. I need not say if such a promise is to be implied by law, but the jury would be right in inferring it. This point, however, was not distinctly raised at the trial, or my brother Platt would have submitted it to the jury. It ought to have been raised distinctly at the trial.

PLATT, B. I also think this rule ought to be discharged. There was no evidence on the plaintiff's case of his having attended at the trial sufficiently to entitle him to succeed on the whole of his demand. — *Rule discharged*.¹

BERTON v. LAWRENCE and others.²

November 20, 1850.

Pleading — Sheriff — Extortion — Certainty — Treble Damages.

A declaration against the sheriff for treble damages, under 29 Eliz. c. 4, stated in detail that five several writs of *fi. fa.* against the plaintiff were delivered to the sheriff, setting out the amount of the indorsements, and it was then averred that the sheriff afterwards, under the said several writs respectively, seized the plaintiff's goods to the value of the said writs. It then alleged that the sheriff took for executing the said writs a large sum, to wit, 52*l.* 12*s.* 3*d.*, the same being more than he was entitled to by 35*l.* 18*s.* 6*d.*, contrary to the form of the statute, whereby an action accrued to the plaintiff for 107*l.* 15*s.* 6*d.*, treble the amount of the damages. To this there was a special demurrer, for not setting out with particularity the amounts taken, and in respect of what fees the excess arose, and that it

¹ In this country, the fees of witnesses being fixed by statute in the several States, without regard to their actual expenses in attending the trial, or to their employment or rank in life, no action will lie here to recover any more than such statutory sum, (unless upon an *express* contract to pay more,) *Fuller v. Matice*, 14 John. 357; but for such fixed sum a witness who is subpoenaed and attends may maintain an action against the party summoning him. *Baker v. Brill*, 15 Johns. 260. *Worland v. Outten*, 3 Dana, 477. And he is equally entitled to his legal fees if he attend and is examined without having been subpoenaed, or if he is subpoenaed and attend, but not examined. *Farmer v. Storer*, 11 Pick. 241. *De Benneville v. De Benneville*, 1 Binney, 46. *Leigh v. Hodges*, 3 Scammon, 15. If a witness be summoned to be used in several suits, in the same court, and at the

same time, he is entitled to compensation from the party calling him, in each case. *Findley v. Wyser*, 1 Stewart, 23. But see *Baldorf v. Eckert*, 3 Barr, 267.

If a person duly summoned and paid as a witness fail to attend, *assumpsit* will not lie for a recovery of the amount paid. The proper remedy is by a process for contempt, or an action on the case for damages. *Leighton v. Twombly*, 9 N. Hamp. 483. But it has been held that a witness is not liable to the penalty fixed by statute, for not attending when subpoenaed, unless his evidence is material. *Courtney v. Baker*, 3 Denio, 27. Nor will the action lie against a witness, who, having been paid his travel and attendance for one day only, attends for that day, and then leaves court, in default of payment for further attendance, without applying to the party for such payment. *Hurd v. Swan*, 4 Denio, 75.

² 20 Law J. Rep. (N. S.) Exch. 46.

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was not averred that the extortion took place within one year before the commencement of the suit.

Semble, that the declaration did not sufficiently show whether there was one or more seizures, but that this objection was not sufficiently taken by the demurrer, and that in other respects the declaration was good.

DEBT for treble damages under 29 Eliz. c. 4, against William Lawrence and Donald Nicoll, sheriff of Middlesex, and William Daniells. The first count, after the usual commencement, stated that, heretofore, to wit, on the 27th of November, 1849, a writ of *fi. fa.* was issued at the suit of Hering and Remington against the now plaintiff, and directed to the sheriff of Middlesex, commanding, &c., (setting out the mandatory part of the writ,) which writ was indorsed to levy 66*l.* 13*s.* and interest on the same, and 1*l.* for the said writ, besides sheriff's poundage and expenses of execution.

The count then set out in a similar way four other writs of *fi. fa.* against the now plaintiff, and proceeded as follows: "Which said several writs so indorsed as aforesaid were afterwards, to wit, on, &c., delivered to the defendants William Lawrence and Donald Nicoll, who then and from thenceforth, until and at and after the time of committing the grievances hereinafter mentioned, were sheriff of the county of Middlesex, to be executed in due form of law. And the defendants William Lawrence and Donald Nicoll, so being and as such sheriff, by the defendant William Daniells, then being their bailiff in that behalf, afterwards, to wit, on the day and year last aforesaid, seized and took in execution under the said several writs respectively, divers goods and chattels of the now plaintiff of great value, to wit, of the value of the moneys indorsed on the said several writs, and thereby directed to be levied; nevertheless, the now defendants William Lawrence and Donald Nicoll, so being and as such sheriff, and the defendant William Daniells, so being and as such bailiff, not regarding their duty in that behalf, nor the form of the statute in such case made and provided, but contriving, &c., afterwards, to wit, on the 19th of January, A. D. 1850, by reason and color of their several offices as such sheriff and as such bailiff as aforesaid, wrongfully, illegally, and oppressively took, had and received of the now plaintiff for the serving and executing of the said several executions a large sum of money, to wit, 52*l.* 12*s.* 3*d.*, the same sum being a larger, greater, more, and other consideration and recompense than by the statute in that behalf is limited and appointed, that is to say, 35*l.* 18*s.* 6*d.* more and other consideration and recompense than in and by the said act is limited and appointed, contrary to the form of the statute in such case made and provided. By means whereof the now plaintiff was and is damaged and aggrieved to the amount of the said sum of 35*l.* 18*s.* 6*d.*, contrary to the form of the statute in such case made and provided, and thereby and by force of the said statute an action hath accrued to the now plaintiff to demand and have of and from the defendants the sum of 107*l.* 15*s.* 6*d.*, being treble the amount of the said damages."

Special demurrer by the defendants William Lawrence and Donald Nicoll, that it is left uncertain what consideration and recompense

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the plaintiff contends ought to have been allowed to and taken by the defendants William Lawrence and Donald Nicoll, nor does the said first count show facts from which it appears that the defendants William Lawrence and Donald Nicoll have taken more consideration and recompense than is by law allowed; and the defendants William Lawrence and Donald Nicoll cannot take issue upon the statements in the count without referring to the jury the determination of the question at law, whether the defendants William Lawrence and Donald Nicoll have taken more than is by law allowed; that it ought to have been shown with particularity in the said first count what the sums were which the defendants William Lawrence and Donald Nicoll were entitled to take, and the excess, if any, on each sum, or from and in what manner or in respect of what charge or fee the excess complained of arose, and of what sum or sums it was composed and made, and how the different sums which might be legally taken were ascertained and fixed; and that it is not sufficient to state a gross sum merely as in the said first count; and that it is not averred that the extortion complained of took place within one year next before the commencement of this suit. Joinder in demurrer.

Bramwell, (*Burchell* with him,) in support of the demurrer.¹ The defendants are unable to ascertain with what they are charged, as the exact amount of the fees rightly payable is not stated. Five writs are stated, but the allegations as to seizure would be satisfied by proof that any goods were seized, as it would be a seizure to satisfy all the writs in the hands of the sheriff. How much was taken on each writ ought to be stated, for the wrongful act is taking the excess. *Pilkington v. Cooke*, 16 Mee. & W. 615; s. c. 17 Law J. Rep. (N. S.) Exch. 141, only decided that a declaration upon the Statute of Elizabeth was sufficient, but there is nothing in that case to show that the particular extortion is not to be stated.

[PLATT, B., referred to *Woodgate v. Knatchbull*, 2 Term Rep. 148.]

Here it is objected by special demurrer, as in *Usher v. Walters*, 4 Q. B. Rep. 553; s. c. 12 Law J. Rep. (N. S.) Q. B. 246.

[PLATT, B. The sheriff is in no difficulty. It is all one transaction, and the plaintiff cannot tell in respect of which writ the excess occurred.]

He might have ruled the sheriff to return the writs separately, since to meet this declaration the defendants must prove all the writs and the amount lawfully due on all. Either five takings should have been charged, or if the sum taken is stated in gross, then what was actually levied should have been averred.

[PARKE, B. The point was before this court in *Ashby v. Harris*, 2 Mee. & W. 673; s. c. 6 Law J. Rep. (N. S.) Exch. 182, but the parties amended. I was then very much impressed with the argument, that a plea of the Statute of Limitations alleging that the action did not accrue within the time allowed by law would be bad.]

¹ November 20, before PARKE, B., ALDERSON, B., and PLATT, B.

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In *Wrightup v. Greenacre*, 10 Q. B. Rep. 1; s. c. 16 Law J. Rep. (N. S.) Q. B. 246, the amounts actually due were stated.

Pigott, contra. *Usher v. Walters* does not decide that this declaration is bad, for there it was framed upon both statutes, and the pleader stated what was to be taken as allowed by the Judges under 7 Will. 4, & 1 Vict. c. 55. Here, what was taken is stated, and what the excess was; therefore, the difference is plainly the amount due. The statute is known to the Court.

[PARKE, B. Is the plaintiff bound to prove that all the writs were levied at the same time?]

Yes.

[PARKE, B. I doubt whether he is tied to prove one seizure only. "Respectively" means some under one and some under the other. This is important, because the Statute of Limitations might be a bar to one and not to the other.]

Extortion is charged as a gross sum. The plaintiff could not tell under which writ the extortion took place. It is reduced to a matter of calculation, and it is plain that it is 12*d.* in the pound.

[PARKE, B. I think the best answer is, that the special demurrer does not object that it is not stated with sufficient certainty whether it was one or more seizures.]

Bramwell, in reply. It is not alleged that 12*d.* in the pound was to be taken; and the defendants cannot tell whether they are charged with having received a gross sum, or several sums in excess. The Statute of Limitations might be an answer to part of the offence charged if there were several seizures. The demurrer sufficiently points this out.

[PARKE, B. You seem to have overlooked this point in the demurrer. Will you amend?]

Bramwell then elected to amend, by pleading to the action.—*Amendment accordingly.*

CUBITT and another v. THOMPSON and others.¹

November 19, 1850.

Pleading — Ambiguity — Bond to Sheriff — Default of Bailiff.

By a deed, after reciting the appointment of W. T. as bailiff to the plaintiffs, the sheriff of Middlesex, the defendants, W. T. and his sureties, covenanted to save harmless the plaintiffs from any action brought against them touching or concerning any matter "wherein the said bailiff shall act, or assume to act as bailiff," or "for, or by reason of, any extortion or escape happening by the act or default of the said bailiff." The declaration, after stating an escape, averred that it happened "by the default of the defendant, W. T., and not otherwise, he, the defendant W. T., then being the bailiff of the plaintiffs as such

¹ 20 Law J. Rep. (N. S.) Exch. 49.

Cubitt & another v. Thompson & others.

sheriff." The defendants cravedoyer, and after setting out the deed, pleaded that the default "was not the default of him, the said W. T., as such bailiff of the plaintiffs:"—

Held, that the plea was bad for ambiguity; but,—

Seem, that the declaration would have been bad on special demurrer, for not showing how the escape was the default of W. T.

COVENANT. The declaration stated that by an indenture, made between the plaintiffs, sheriff of Middlesex, of the one part, and the defendants of the other part, (*profert*.) after reciting the appointment of the defendant W. Thompson, as bailiff of the plaintiffs, the defendants covenanted with the plaintiffs, that the said W. Thompson should not suffer any escape, nor permit any prisoner in his custody, as bailiff aforesaid, to go at large, without the consent or order in writing of the said sheriff or other lawful authority; that if any action or suit was commenced or prosecuted against the plaintiffs, their under-sheriff, or deputies, or any of them, touching or concerning any matters wherein the said W. Thompson should act, or assume to act, as bailiff aforesaid, the said W. Thompson should well and truly pay to the plaintiffs, their under-sheriff or deputies, or one of them, all costs, charges, damages and losses by them or any of them incurred, paid, or sustained in or about the defence, or in consequence of, any such action or suit, and that the defendants would save harmless and indemnify the said plaintiffs, their under-sheriff and deputies, from and against all actions, suits, fines, amerciaments, penalties, contempts, forfeitures, loss, costs, damages, and expenses, which might be commenced, prosecuted, imposed and set upon them or either of them, or which they or either of them might suffer, pay or be liable unto, for or by reason of any extortion or escape happening by the act or default of the said W. Thompson, or for or by reason of the executing, not executing, returning, not returning, or misreturn of any writ, process, mandate, precept or warrant, the not taking bail, taking insufficient bail, the not bringing into Court the body of any defendant, or any other cause whatsoever happening by or arising from the act, or omission, or instance, or request of the said W. Thompson. The declaration then stated that whilst the defendant W. Thompson was their bailiff, one M. Morgan sued out a writ of *ca. sa.* directed to the sheriff of Middlesex, to take the body of one W. Hanson, and that the plaintiffs as sheriff took the said W. Hanson. And the last breach was, that after the said W. Hanson had been so arrested as aforesaid, and whilst he was in the custody of the plaintiffs, as such sheriff as aforesaid, under and by virtue of the said writ and indorsement thereon as aforesaid, and in pursuance of the said arrest, and whilst the said defendant W. Thompson was such bailiff of the plaintiffs, as such sheriff as aforesaid, under and in pursuance of the nomination aforesaid, to wit, &c., the said W. Hanson, without the permission and against the will of the plaintiffs, as such sheriff as aforesaid, and of the said M. Morgan, escaped out of the said custody of the plaintiffs, as such sheriff as aforesaid, and that such last-mentioned escape then happened by the default of the said defendant W. Thompson, he, the said defendant W. Thompson, ther

being bailiff of the said plaintiffs, as such sheriff as aforesaid, under and in pursuance of the nomination aforesaid. Averment, that in consequence of the escape the plaintiffs had been sued by M. Morgan, and judgment recovered for 66*l.* 12*s.* 8*d.* and costs.

The defendants cravedoyer of the indenture, and set it out. Among other covenants, it contained the following: "That the said bailiff and his said sureties shall and will save harmless and indemnify the said sheriff, under-sheriff and deputies from and against all actions, suits, fines and amerciaments, penalties, contempts, forfeitures, loss, costs, damages, and expenses which may be commenced, prosecuted, imposed, or set upon them or either of them, or which they or any or either of them may suffer, pay, or be liable unto, for or by reason of any extortion or escape happening by the act or default of the said bailiff, or for or by reason of the executing, not executing, returning, not returning, or misreturn of any writ, process, mandate, precept or warrant, the not taking bail, taking insufficient bail, the not bringing into Court the body of any defendant, or any other cause whatsoever happening by or arising from the act or omission, or instance, or request of the said bailiff." It also contained a covenant that the defendants would indemnify the plaintiffs against all actions, &c., "touching or concerning any matter wherein the said bailiff shall act, or assume to act, as bailiff aforesaid."

The defendants pleaded (*inter alia*) to the last breach, that the said default of the said W. Thompson in that breach mentioned, by which the said W. Hanson so escaped, as in that breach mentioned, was not a default of him, the said W. Thompson, as such bailiff of the plaintiffs as in the declaration mentioned *modo et forma*, concluding to the country.

Special demurrer and joinder.

Bramwell, (*Burchell* with him,) in support of the demurrer. The plea is bad. The escape is admitted; and the traverse, that it was not by the default of W. Thompson, as bailiff, is ambiguous. It is sufficient that the escape happened by his default; and it is quite immaterial whether it was his default *as bailiff*. The deed is to protect the sheriff from the consequences of the acts of the bailiff as bailiff, or when assuming to act as bailiff, or any acts by which the sheriff is damnified, without any reference to the character in which such acts were done. Suppose, for instance, this particular escape happened by reason of the defendant W. Thompson releasing a debtor without first searching the detainer book. This would be within the covenant of the defendants, although not strictly an act as bailiff for the execution of any particular writ.

[PARKE, B. The declaration does not state what the default was, or how the escape occurred. It would be bad on special demurrer.]

That defect is cured by the defendant's having pleaded instead of demurring.

Crompton, contra. Either the declaration is bad, or the plea is good. It is implied by the terms of the declaration that the default

Von Dadelzen v. Swann.

was as bailiff. The deed, as set out on oyer, does not contain a covenant to indemnify against the acts of W. Thompson, but against the acts of the "said bailiff." If the default complained of was not a default in his character as bailiff, then the declaration is bad.

PARKE, B. The plea is clearly bad, as the traverse may mean several things. The declaration would, I think, be bad on special demurrer; but it is good on general demurrer. It does not show how the escape occurred; but the deed protects the sheriff against the acts of W. Thompson either as bailiff or assuming to act as bailiff, or when acting in some relation to his duties so that it would be a default for which the sheriff would be liable.

POLLOCK, C. B., ALDERSON, B., and PLATT, B., concurred. — *Judgment for the plaintiffs.*

VON DADELSZEN v. SWANN.¹

November 11, 1850.

Stamp — Receipt — Agreement.

The following document was held to be admissible in evidence stamped as an agreement and not as a receipt: "I have received your cheque for 391*l.* 10*s.* 3*d.*, being the payment for an overdue bill and interest, in the hands of the Derby and Derbyshire Bank, and I hereby undertake to procure and hand the said bill over to you, and I have now given you Messrs. Dixon's order for 500 tons of iron."

ASSUMPSIT against the defendant, for non-performance of an agreement to procure and hand over to the plaintiff a certain dishonored bill of exchange for 391*l.* 10*s.* 3*d.*

Plea — Non assumpsit.

At the trial before Pollock, C. B., at the Maidstone Summer Assizes, in order to prove the agreement the plaintiff put in the following letter, addressed to him by the defendant: "Dear sir, — I have received your cheque for 391*l.* 10*s.* 3*d.*, being the payment of an overdue bill and interest, in the hands of the Derby and Derbyshire Bank, and I hereby undertake to procure and hand the said bill over to you, and I have now given you Messrs. Dixon's order for 500 tons of iron. Yours, &c." Signed by the defendant. This letter was stamped with a 2*s.* 6*d.* agreement stamp; but it was objected, that it was not admissible without a receipt stamp. His Lordship, however, admitted the document, and a verdict was given for the plaintiff, with leave to the defendant to move to enter a nonsuit.

Lush now moved accordingly. The document is an agreement, but it is also a receipt for the sum of 391*l.* 10*s.* 3*d.*, and should have been stamped with a 5*s.* receipt stamp. The schedule to the Stamp

¹ 20 Law J. Rep. (N. S.) Exch. 50.

Litchfield v. Ready.

Act, 55 Geo. 3, c. 184, tit. "Receipt," enacts that all receipts, discharges, and acknowledgments which shall be given for or upon payments made by or with any bills of exchange, drafts, promissory notes, or other securities for money, shall be deemed and taken to be receipts given upon the payment of money within the intent and meaning of the schedule.

[PARKE, B. It is clear that this is within the eleventh exemption. The consideration for the agreement is the cheque, and this therefore is a receipt "acknowledging the receipt of the consideration money therein expressed," and the instrument is "duly stamped according to the laws in force at the date thereof," as an agreement.]

It is not expressed to be the consideration.

POLLOCK, C. B. The letter is in substance, that in consideration of the cheque which pays the bill, the defendant is to deliver up the bill so paid.

PARKE, B. The object was an agreement to deliver up the security, and the consideration for the agreement is clearly expressed. The document was rightly received.

ALDERSON, B., and PLATT, B., concurred. — *Rule refused.*

LITCHFIELD v. READY.¹

December 4, 1850.

Trespass for Mesne Profits — Mortgagee — Entry by Relation — Judge's Order.

A party having mortgaged his premises to the plaintiff in 1846, and being allowed to remain in possession, let them in 1848 to the defendant. In October, 1849, the plaintiff, without having made an entry on the premises, or having been otherwise in possession, brought ejectment against the defendant, who gave his consent to a Judge's order dated the 31st of October. The order directed proceedings to be stayed till the 15th of November then next, the tenant in possession undertaking on that day to give up possession to the plaintiff, and that in default the plaintiff should be at liberty to sign final judgment and issue execution against the tenant for the costs of such judgment, execution, writ of possession, costs of levy, &c. On the 15th of November the plaintiff first entered into possession of the premises and brought an action for mesne profits accrued between November, 1848, and the 15th of November, 1849:—

Held, that the plaintiff not having been in possession of the premises prior to the 15th of November, could not maintain the action, his entry on that day not having relation back to his title as mortgagee; and that the Judge's order made no difference in the case.

The doctrine of entry by relation applies to the case of disseisor and disseisee only.

TRESPASS for mesne profits, from the 25th of November, 1848, to the 15th of November, 1849.

Pleas, first, not guilty; secondly, that the messuage in which, &c., was not the messuage of the plaintiff.

At the trial, before Alderson, B., at the Middlesex Sittings in Easter term last, the facts appeared to be as follows: On the 24th of No-

¹ 20 Law J. Rep. (n. s.) Exch. 51.

Litchfield v. Ready.

vember, 1846, one Sharpe mortgaged the messuage in question in fee to the plaintiff, and in September, 1848, let it to the defendant. In September, 1849, the plaintiff gave notice of the mortgage to the defendant, and required him to pay him the rent. On the 27th of October, 1849, a declaration in ejectment was served on the defendant, at the suit of the plaintiff. On the 31st of October the defendant consented to give up possession of the messuage, and accordingly gave his consent to the following Judge's order:—

"Doe, on the demise of Charles Litchfield, plaintiff, against Richard Roe, defendant, Henry Ready, tenant. Upon reading the consent of the attorney for the lessor of the plaintiff, and of Henry Ready, the tenant in possession, I do order that all further proceedings in this action be stayed until the 15th day of November next, the tenant in possession hereby undertaking on that day to give up possession of the premises in the declaration of ejectment mentioned to the lessor of the plaintiff on his assent; and that, in default, the lessor of the plaintiff shall be at liberty to sign final judgment and issue execution against the said Henry Ready for the amount of the costs of such judgment, execution, writ of possession, cost of levy and delivery of possession, sheriff's poundage, officer's fees, and all other incidental expenses. Dated the 31st day of October, 1849.

"Denman."

On the 15th of November, 1849, the defendant gave up possession to the plaintiff.

The jury found a verdict for the plaintiff, damages 14*l.*, being the amount of mesne profits from the 25th of November, 1848, to the 15th of November, 1849, leave being reserved to the defendant to move to enter a verdict for him.

Aspland having obtained a rule *nisi* accordingly, —

Phinn now showed cause. The plaintiff is entitled to succeed on one of two grounds: first, that having entered on the 15th of November, 1849, his entry relates back to the time when his title first accrued by the mortgage, that is, in 1846; or, secondly, that he has given evidence of the defendant's having admitted his title by means of the Judge's order. As to the first point, the plaintiff's proposition is that the mortgagor, who was in possession after the execution of the mortgage, was a mere bailiff to the mortgagee. The plaintiff could maintain the present action by virtue of an entry by relation, which may be referred back to the date of the mortgage. The law is thus stated in Buller's *Nisi Prius*, 87: "But it may admit of doubt what proof of an actual entry is sufficient. It has been said that the plaintiff will be entitled to recover the mesne profits only from the time he can prove himself to have been in actual possession; and thereupon if a man make his will and die, the devisee will not be entitled to the profits till he has made an actual entry. Others have holden, that when once he has made an actual entry, that will have relation to the time his title accrued, so as to entitle him to recover the mesne profits from that time, and they rely on the case in *Sid.* 239, which

was trespass brought for the mesne profits *devant le lease*, and nothing said in the case about proving an actual entry antecedent to it." *Tharpe v. Stallwood*, 5 Man. & G. 760; s. c. 12 Law J. Rep. (N. S.) C. P. 241, *Doe v. Wright*, 2 P. & D. 672; s. c. 10 Ad. & E. 763, and *Doe v. Wellsman*, 2 Exch. Rep. 368; s. c. 18 Law J. Rep. (N. S.) Exch. 277, are in point.

[PARKE, B. A mortgagor is not in all respects a mere bailiff; he is much like a bailiff; he is not a mere tenant at will; in fact, he can be described merely by saying he is a mortgagor.]

Keech v. Hall, Dougl. 21, and *Wheeler v. Montefiore*, 2 Q. B. Rep. 133; s. c. 11 Law J. Rep. (N. S.) Q. B. 34, throw much light on this point. The law is also stated in Com. Dig. tit. "Trespass," B, 3.

[PARKE, B. In *Lutwich v. Mitton*, Cro. Jac. 604, it is stated that a bargainee under the Statute of Uses cannot bring an action of trespass without entry and actual possession, and the law is laid down in similar terms in Com. Dig. tit. "Trespass," B, 3. The doctrine of entry by relation applies only to the case of disseizor and disseizee. There a party disseized on recovering possession may, by the doctrine of relation, obtain damages from the time of his first entry. The object is to punish the disseizee. All the cases are collected in *Doe v. Wright*.]

In *Butcher v. Butcher*, 1 Man. & Ry. 220, the law is thus stated in a note by Serjeant Manning: "Ejectment is founded upon a right to enter and make the demise to the nominal lessee. Whoever, therefore, can maintain ejectment, may enter peaceably without action; and upon such entry the legal possession vests with relation to the period at which the title of the party accrued; so that he may now sue for the mesne trespasses which brings the right of possession and the lawfulness of the entry directly in question." He then goes on to observe, "The common action of trespass for mesne profits, after an *hab. fac. poss.*, is founded upon this principle; and if the plaintiff claims to be remitted to a constructive possession anterior to the demise in ejectment, so that he can no longer avail himself of the estoppel created by the judgment in ejectment, he raises the question of title in the old way." *Aslin v. Parkin*, 2 Burr. 665, decides that in trespass for mesne profits after any recovery in ejectment, it is sufficient for the plaintiff to prove the judgment in ejectment, the writ of possession executed, and the value of the profits. Now, in a judgment against the casual ejector, where there is no confession of lease, entry and ouster, the state of things is the same as if the defendant had said to the plaintiff, "I have received your declaration and I will go out of possession." In the present case, the Judge's order has the same effect. He cited *Hunter v. Britts*, 3 Camp. 455, and *Calvart v. Horsfall*, 4 Esp. 167.

Aspland, in support of the rule, was not called upon.

PARKE, B. There are two points in this case. The first is, whether the plaintiff, the mortgagee, not having been in possession of the premises, can maintain an action of trespass for mesne profits prior

to his entry of the 15th of November, 1849. The second point is, whether the Judge's order amounts to an agreement by the defendant to put himself in the situation of one against whom judgment has been obtained in ejectment. As to the first point, the question is, whether there is to be a relation back of possession to the date of the mortgage deed. The general doctrine is, that where a man is disseized, and reënters, there is a relation back to the time of his first entry, and he may bring an action from that period. But that rule applies only to cases of disseizin, and all the authorities on the subject that are collected in 2 Roll. Abr. tit. "Trespass per Relation," p. 554, are cases of that description. Indeed, it is common learning that an action of trespass cannot be maintained without entry. So where there is a conveyance under the Statute of Uses, an action of trespass cannot be maintained until entry. In the present case, there is no relation back to the title of the mortgagee. In an action for mesne profits, it is said that the record in ejectment is conclusive evidence of the plaintiff's title, unless the plaintiff can rely on the estoppel by pleading it, and does not think fit to reply it. An opportunity of doing so was given in *Doe v. Wellsman*, but not in *Armstrong v. Norton*, 2 Irish Law Rep. 96. In *Doe v. Huddart*, 2 Cr. M. & R. 316; s. c. 4 Law J. Rep. (n. s.) Exch. 316, this Court held that a judgment in ejectment was only *prima facie* evidence of title. In *Armstrong v. Norton*, in the Exchequer in Ireland, it was said to be conclusive. But the New Rules have not been introduced into Ireland, and therefore, as the estoppel cannot be replied, the Judges of those Courts properly hold that the evidence is conclusive. In *Doe v. Huddart*, the defendant pleaded that the premises in question were not the premises of the plaintiff, and as therefore the plaintiff might have relied on the estoppel in his replication, and did not, the Court held the evidence not to be conclusive. The rule is thus laid down in *Treviban v. Lawrence*, 2 Ld. Raym. 1048; 1 Salk. 276: "Where the plaintiff's title is by estoppel, and the defendant pleads the general issue, the jury are bound by the estoppel; for here there is a title in the plaintiff that is a good title in law, and a good title if the matter had been disclosed and relied on in pleading; but if the defendant pleads the special matter, and the plaintiff will not rely on the estoppel when he may, but takes issue on the fact, the jury shall not be bound by the estoppel, for then they are to find the truth of the fact which is against him. *Aslin v. Parkin* shows that the record in ejectment may be evidence of the plaintiff's possession of the premises at the time of the demise, and therefore on the production of the record the plaintiff may become entitled to recover mesne profits from that period. But it appears from the authorities, that if the plaintiff seeks to recover mesne profits antecedently to the day of the demise in the ejectment he must go further, and must give such evidence as would entitle him to succeed in an ordinary action of trespass. The judgment of Coltman, J., in *Tharpe v. Stallwood*, is in point; he says, "When the rule was first moved for, it occurred to me to ask how it was that a successful lessor of the plaintiff in ejectment could maintain trespass for mesne profits antecedent to the day of demise;

Lewis v. Forsyth.

as he had no right of action at the time the alleged trespass was committed. It appeared to me that in that case the defendant was not made a wrong-doer by relation, but was shown to have been one at the time the profits accrued. To that question I received no answer, except that ejectment was a peculiar action. But the rule is the same as obtained in the old action of trespass for disseizin, when the disseizee, upon recovering possession, might maintain an action for the profits accruing in the intervening period." That proceeds on the ground that a disseizee having entered and being turned out, is remitted to his original possession. In the present case, therefore, the plaintiff to be entitled to succeed would be bound to prove in himself a title to maintain trespass, namely, a title completed by possession of the property with respect to which the action is brought. Here the mortgagee was out of possession up to the 15th of November, 1849, and cannot bring an action for mesne profits prior to that date.

The other point made by the plaintiff is, that the consent to the Judge's order has the same effect as a recovery in ejectment. But the only matter in dispute at the time was, whether the defendant was to give up possession of the premises without being liable to the costs of signing judgment in ejectment and of the execution. That, however, is not the question here. There is no plea of accord and satisfaction, but the issue is whether the close belonged to the plaintiff at the time of the trespass. The plaintiff had a right to the property in dispute, and the only question is whether he had possession of the premises at the time of action brought, and I think that the bare fact of his being mortgagee is not sufficient.

ALDERSON, B., PLATT, B., and MARTIN, B., concurred. — *Rule absolute.*

LEWIS v. FORSYTH.¹

In the Exchequer Chamber,² November 25, 1850.

Costs — Suggestion under the County Courts Act — Jurisdiction of the Court to try disputed Facts.

Where the defendant's affidavits, on a motion for a suggestion under the County Courts Act to deprive the plaintiff of costs, stated that the residence of the plaintiff was within twenty miles of that of the defendant, and that the cause of action arose wholly within the jurisdiction of the County Court of B., which facts were denied by the affidavit of the plaintiff, the Court refused to determine those questions on affidavits, and directed a suggestion to be entered.

THIS was a rule, obtained on the part of the defendant, to enter a suggestion to deprive the plaintiff of costs, under the 9 & 10 Vict. c. 95, the plaintiff having obtained a verdict in this Court, in an action for work and labor, with damages, 12*l.* 13*s.* The affidavit on

¹ 20 Law J. Rep. (N. S.) Exch. 25.

² Before PLATT, B., sitting alone in the Exchequer Chamber.

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which the rule had been obtained stated, amongst other things, that the plaintiff resided within twenty miles of the residence of the defendant, and that the cause of action arose wholly within the jurisdiction of the Bloomsbury County Court. The affidavit, in opposition, denied that the parties resided within twenty miles from the residence of each other; and stated, that the cause of action arose within the jurisdiction of the Clerkenwell Court, and not within the jurisdiction of the Bloomsbury County Court.

Hawkins showed cause. This rule must be discharged. The Court will not direct a suggestion to be entered when the facts stated in the affidavit on which the rule was obtained are altogether denied. The Court will discharge the rule, and leave the defendant, if he pleases, to indict the plaintiff for perjury. In *Caterer v. Dean*, 19 Law J. Rep. (N. S.) Q. B. 326, the defendant's affidavit, that the contract was made within the jurisdiction of a certain County Court, was contradicted by the plaintiff's affidavit, which stated that the contract was not made within that district, and there Coleridge, J., sitting in the Bail Court, refused to allow the suggestion to be entered, holding it to be the duty of the Court, under the circumstances, to dispose of the matter on the affidavits, and not to allow the question to be tried by a jury on a traverse of the suggestion.

Horn, in support of the rule. The case of *Caterer v. Dean* was decided upon the peculiar circumstances of the case, the only point there being whether the contract was made within the jurisdiction of the County Court. In the present case, the residence of the two parties is a fact which ought to be tried by a jury, and cannot be determined by the Court. The rule as to this point is laid down in *Watson v. Quilter*, 11 Mee. & W. 760; s. c. 12 Law J. Rep. (N. S.) Exch. 405. *Broad v. Carey*, 19 Law J. Rep. (N. S.) Exch. 283, is directly opposed to *Caterer v. Dean*. There, the plaintiff's affidavits denied the allegations of the place of the plaintiff's residence, and of the place where the cause of action arose. The decision was this: "The Court cannot enter into the question upon conflicting affidavits. The plaintiff must traverse the suggestion." In *Nolloth v. Crook*, Ibid. Q. B. 185, the Court allowed a suggestion to be entered, to try the question of the parties residing within twenty miles of each other. *Mills v. Best*, Ibid. 328, decided by Coleridge, J., is also in point.¹ (He was then stopped.)

PLATT, B. The rule must be absolute for entering the suggestion. The plaintiff may traverse the allegations contained in it. — *Rule absolute*.

¹ In *Mills v. Best*, Coleridge, J., said, "I am not, however, desirous of avoiding the reconsideration of that case (*Caterer v. Dean*) whenever a fitting opportunity shall arise."

O'Connor v. Bradshaw.

O'CONNOR v. BRADSHAW.¹

November 21, 1850.

Company, Illegality of — Lottery Acts — Bank Act — Libel — Misdirection.

A company consisting of a large number of persons subscribing small sums, was formed for the purpose of buying land, erecting dwellings thereon, and allotting the same to the subscribers. The allotment depended upon the result of a ballot.

In connection with this company there was established a bank for receiving the deposits of small capitalists and working men, upon the security of the property of the company; and as part of the same concern, a bank in which the subscribers of the company might place their savings for purchasing their land from the company.

The Judge, in an action of libel, having directed the jury that the whole of this scheme was illegal, on the grounds of its being contrary to the Lottery Acts, and also to the Bank Act:—

Held, that the scheme being illegal, as being contrary to the Bank Act, there was no misdirection.

Quere, Whether it was contrary to the Lottery Acts.

LIBEL. The declaration recited that the plaintiff was a member of Parliament, and that there had been established a company, called "The National Land Company," to which there were 50,000 subscribers of a fund of 100,000*l.*, of which company the plaintiff was a director. The declaration then set out the libel, which stated, amongst other things, that the plaintiff had wheedled the people of England out of 100,000*l.*, with which he had bought estates, and conveyed them to his own use and benefit; and that his excessive *honesty* in connection with the land plan had been and would be exposed in the *Nottingham Journal*.

The defendant pleaded, first, not guilty; secondly, a special plea of justification. This plea set out facts relating to the formation of the National Land Company and of a bank connected therewith, together with the rules for the government thereof, and then alleged various facts and reasons for the purpose of showing that the plaintiff was dishonest in connection with the land plan.

Replication to the second plea, *de injuria*.

At the trial, before Pollock, C. B., at the Middlesex Sittings, after Hilary term, 1849, the following facts appeared: The plaintiff was member of Parliament for Nottingham, and the projector of a company, called "The National Land Company," the object of which was to purchase land, erect dwellings, and allot them to its members on such terms as should enable them to become small freeholders and live in comfort and independence. These objects were to be effected in the following manner. A large sum of money was to be raised by shares of 1*l.* 6*s.* each, and was to be laid out in the purchase of land and the erection of houses. The subscriber of two shares, or 2*l.* 12*s.*, became entitled to a house, two acres of land, and an advance of 15*l.* The subscriber of three shares to a house, three acres of land, and 22*l.* 10*s.* Their right, however, to obtain these advantages was not absolute, but depended upon the result of a ballot, according to

¹ 20 Law J. Rep. (N. S.) Exch. 26.

which a small number only of the subscribers could obtain present possession of houses, land, and money, so that in five years, during which the plan was in operation, out of 70,000 shareholders 227 only had obtained allotments.

The mode in which the allottees of land were to be located is thus described in the first set of rules: "Good arable land may be rented in some of the most fertile parts of the country at the rate of 15s. per acre, and might be bought at twenty-five years' purchase, that is, at 18l. 15s. per acre; and supposing 5,000l. raised in shares of 2l. 10s. each, this sum would purchase 120 acres and locate sixty persons with two acres each, besides leaving a balance of 2,750l., which would give to each of the occupants 46l. 16s. 8d., 30l. of which would be sufficient to build a commodious and comfortable cottage on each allotment; one half of the remaining 15l. 16s. 8d. would be sufficient to purchase implements, stock, &c.; leaving the residue as a means of subsistence for the occupant until his allotment produced the necessities of life. These allotments, with dwellings, might be leased forever to the members of the society at an annual rental of 5l. each, which would be far below their real value. The gross annual rental would thus amount to 300l. This property, if sold at twenty years' purchase, (which would be below the market value,) would yield to the funds of the society 6,000l., which sum, if expended in a similar manner to the first, would locate other seventy-two persons. These seventy-two allotments sold at the rate of the first would bring 7,200l., and this sum laid out in the purchase of other land, building of cottages, &c., at the original cost, would locate 86½ persons. These 86½ allotments, if sold, would realize 8,634l. 8s., and with this amount of capital the society could locate other 103½ persons. These 103½ allotments would produce 16,317l. 3s. 4d., and the last-named sum expended as before would locate 123½ persons. Thus the original capital of 5,000l. would more than double itself at the fourth sale, and so on in the same ratio. The benefits arising from the expenditure of the funds in the manner above stated may be seen at a glance in the following summary:—

	£.	s.	d.	Purchase	Locate
Original capital,	5,000	0	0	120 a.	60 persons.
1st sale produce,	6,000	0	0	144	72 "
2d " "	7,200	0	0	172	86 "
3d " "	8,634	8	0	206	108 "
4th " "	10,317	8	4	246	123 "

continuing to increase in the same proportion until the tenth sale, which would realize 37,324l., and locate 572½ persons. Thus the total number which could be located in ten sales, which, if the project be taken up with spirit, might easily be effected in four years, would be 1,923 persons, in addition to having in possession of the society an estate worth, at least, in the wholesale market, 37,324l., which estate could be resold, increasing at each sale in value and capability of sustaining the members, until in the space of a few years a vast number of the "surplus labor population" could be placed in happiness and prosperity upon the soil of their native land, and thus become valuable consumers as well as producers of wealth."

In connection with the National Land Company, the plaintiff also established a bank called "The National Land and Labor Bank." The purposes of this bank were twofold: it was to be, first, a bank of deposit in which small capitalists, working men, and benefit societies might deposit their funds upon the security of the company's property; secondly, a bank of redemption, in which the shareholders might place their savings for the purpose of purchasing their land, &c., from the company.

The learned Chief Baron directed the jury that the whole of the plaintiff's scheme was illegal, first, on the ground of its being contrary to the Bank Act; and, secondly, of its being contrary to the Lottery Acts.

The jury found a verdict for the defendant, stating it as their unanimous opinion that the plaintiff's character stood unimpeached as regarded his personal honesty.

Wilkins, Serj., having obtained a rule for a new trial, on the ground principally of misdirection, —

Roebuck, Keating, and Bagley showed cause. The learned Chief Baron was right in telling the jury that the plaintiff's scheme was illegal, as being contrary both to the Bank Act and the Lottery Acts. First, it was contrary to the Bank of England Charter Act, 7 & 8 Vict. c. 32; secondly, the scheme was illegal, as being contrary to the Lottery Acts, or at common law. *Allport v. Nutt*, 1 Com. B. Rep. 974; s. c. 14 Law J. Rep. (N. S.) C. P. 272; 12 Geo. 2, c. 28, s. 11; 42 Geo. 3, c. 119, s. 5; *Faikney v. Reymous*, 4 Burr. 2069; 10 & 11 Will. 3, c. 17; 6 Geo. 2, c. 35, s. 29; 10 Ann. c. 26; 9 Geo. 1, c. 19; 22 Geo. 3, c. 47; and *Gatty v. Field*, 9 Q. B. Rep. 431; s. c. 15 Law J. Rep. (N. S.) Q. B. 408.

Atherton and Prentice, contra, cited and referred to the preamble of 22 Geo. 3, c. 47; 7 & 8 Vict. c. 109; 9 & 10 Vict. c. 48; 6 Geo. 4, c. 16, s. 72; *Esdall v. Russell*, 4 Man. & G. 1090; s. c. 12 Law J. Rep. (N. S.) C. P. 4; *Silver v. Barnes*, 8 Sc. 300; 9 Law J. Rep. (N. S.) C. P. 118, and Bac. Abr. "Coparcener," (C.) — *Cur. adv. vult.*

PARKE, B., now said, — I think this rule ought to be discharged. It was granted on the ground of misdirection, and the principal misdirection, which induced me to concur in granting that rule, was a statement that my Lord Chief Baron had told the jury that this scheme was illegal within the Lottery Acts. All the objections to the summing up were argued before us on showing cause, and I think those objections, as they are presented to us, are not supported. The first question is, whether my Lord was right in telling the jury that this was a lottery within the meaning of the Lottery Acts, particularly the 12 Geo. 2, c. 28. Now, if the question were to turn upon this, whether it was or not illegal within the meaning of that act, I should like to take further time for consideration, because, after giving it every consideration in my power, I cannot bring myself to the opin-

Sutherland v. Mills.

ion that this is a scheme illegal within the Lottery Acts. Although I do not mean, at present, to say I differ from my Lord Chief Baron on that point, I am not perfectly satisfied to agree with him; and if this was the main part of the statement, and essential to the justice of the case, and if, in order to support the view taken by my Lord Chief Baron, it was necessary to show that this scheme was illegal within the Lottery Acts, I think there ought to be a new trial; but it is perfectly clear, from the statement of the mode in which that part of the case was presented to the jury, that my Lord told the jury that the whole scheme was illegal, that being a portion of the case, in order to show that the effect of the scheme was to delude the public, stating that illegality as one of the circumstances. He mentioned that it was illegal on two grounds: first, as being contrary to the Bank Act; and, secondly, as being contrary to the Lottery Acts; and it was only one instance of illegality, and it is perfectly clear, that the scheme was illegal, as being a violation of the Bank Act; and if illegal in one respect, it seems to me not to affect the summing up, or to satisfy us that justice has not been done, it being clearly illegal in one respect. I think it immaterial to consider whether it was illegal in other respects, in this action; what the result may be in another proceeding is a different question. I think, therefore, my Lord's summing up, in this respect, cannot be the ground of a new trial; it being perfectly right on one ground of illegality, and with respect to the other, it being doubtful whether he is right or not. The learned Judge then adverted to the other points in the case, and said that the rule must be discharged. — *Rule discharged.*

SUTHERLAND v. MILLS.¹

In the Exchequer Chamber,² December 2, 1850.

*Costs of Defendant in Error — Judgment for Plaintiff below affirmed
— No Delay of Execution.*

If the plaintiff below recovers judgment by default, and the defendant below after payment of the debt and costs sues out a writ of error on which the former judgment is affirmed in the Court of Exchequer chamber, the plaintiff below is not entitled to his costs in error under the stat. 3 Hen. 7, c. 10, as he has not been delayed in the execution of his judgment.

ERROR from the Court of Exchequer.

This was a motion for a rule calling upon the plaintiff in error to show cause why the Master should not tax the costs of the defendant in error.

The plaintiff below had brought an action of covenant in the Court

¹ 20 Law J. Rep. (N. S.) Exch. 28.

² Coram PATTESON, J., COLERIDGE, J., WIGHTMAN, J., CRESSWELL, J., ERLE, J., WILLIAMS, J., and TALFOURD, J.

of Exchequer to recover a call of 5*l.* per share on two hundred shares in the Neptune Marine Insurance Company, of which shares the defendant was the registered proprietor.

The defendant, who was under terms to plead, pleaded a non-issuable plea, on which the plaintiff signed interlocutory judgment as for want of a plea; but upon payment into court of the amount of the debt, proceedings were stayed, to allow the defendant time to apply to arrest the final judgment. The defendant, accordingly, moved in arrest of judgment, but failed in his application. Thereupon the costs were taxed, and a computation of interest was made by consent, and the amount was paid to the plaintiff, and the plaintiff obtained out of court the sum which had been paid in, so that it became unnecessary to issue execution. After that the defendant brought a writ of error, and the judgment of the court below was affirmed in the Court of Exchequer Chamber, last Trinity term, 1850. The plaintiff below, the defendant in error, then applied to the Master to tax his costs in error; but the Master declined to do so without the direction of the Court, being of opinion that the defendant in error was not, under the circumstances, entitled to costs in error.

G. R. Clarke, in support of the motion. This application is made under the stat. 3 Hen. 7, c. 10, which, after reciting that defendants often sued out writs of error, to reverse judgments given for plaintiffs, in order to delay execution, proceeds to enact, "that if any such defendant," &c., "sue afore execution had any writ of error to reverse any such judgment, in delaying of execution, that then, if the same judgment be affirmed good on the said writ of error, and not erroneous," &c., "that then the said person or persons against whom the said writ of error is sued, shall recover his costs and damage for the delay and wrongful vexation, by the discretion of the justice afore whom the said writ of error is sued." It is submitted that this clause entitles the defendant in error to his costs. As the debt and costs below were paid without it becoming necessary to issue execution, and before the writ of error was sued out, it cannot be contended that there has been any delay of execution, but there has been that "wrongful vexation" to the plaintiff below, which the statute seems to contemplate as a ground for costs, for the wrongful vexation is the same, whether the plaintiff below be delayed or not in getting the amount sought to be obtained by the judgment. The case, therefore, is distinguishable from the case of *Newlands v. Holmes*, 4 Q. B. Rep. 858, where the application was for double costs under the 2d stat., 13 Car. 2, c. 2, which, when the defendant below in delay of execution sues out a writ of error, to reverse a judgment for the plaintiff after verdict, and the judgment below is affirmed, gives the defendant in error double costs for the delaying of execution, but says nothing about any wrongful vexation.

PATTESON, J. Delaying the execution of the judgment must mean delaying the plaintiff below (the defendant in error) in reaping the fruits of the judgment. As the plaintiff below had execution of his

Nurden v. Fairbanks & another.

judgment, that is, as his judgment was satisfied before the writ of error was sued out, the case does not fall within the provision of the statute. We are all of opinion, that the defendant in error is not entitled to costs in error. — *Rule refused.*

NURDEN v. FAIRBANKS and another.¹

November 9, 1850.

Frivolous Action — Stay of Proceedings — Tender.

An action of debt having been brought in the superior court to recover 9*l.* 10*s.*, the defendants pleaded, except as to 8*l.* 14*s.*, never indebted, and as to 8*l.* 14*s.* a tender and payment of that sum into Court. The jury found a verdict for the plaintiff on the first issue, damages 16*s.*, and for the defendants on the plea of tender. A motion having been made to stay the proceedings on payment of the debt, without costs, on the ground of the action being frivolous, the Court refused the rule.

THIS was a motion for a rule calling on the plaintiff to show cause why all proceedings in this cause, which was tried before the Secondary, should not be stayed on payment of the debt, without costs, on the ground of the action being frivolous, or why the defendant should not be at liberty to enter a suggestion to deprive the plaintiff of costs, under the County Courts Act, 9 & 10 Vict. c. 95.

The action was brought in debt to recover the sum of 9*l.* 10*s.*, to which the defendants pleaded, except as to 8*l.* 14*s.*, never indebted, and as to 8*l.* 14*s.* a tender and payment of that sum into Court. The jury found a verdict for the plaintiff on the first issue, damages 16*s.*, and for the defendants on the plea of tender.

Joyce, in support of his motion. This application is made on two grounds: first, that the action was brought in the Superior Court, to recover a sum under 40*s.*, and is therefore frivolous; and, secondly, that the plaintiff recovered less than 20*l.* First, this action is in substance brought to recover a sum less than 40*s.*, for it was brought to recover the sum of 9*l.* 10*s.*, to which the defendants pleaded a tender of 4*l.* 18*s.* and paid that sum into Court, and the jury found that issue for them, and a verdict for the plaintiff, damages 16*s.*; the action, therefore, was, in substance, brought to recover the sum of 16*s.* If a tender is made and refused, and the sum tendered is afterwards brought into Court, it is the same as if a tender had been made before action brought. He cited *Stutton v. Bament*, 3 Exch. Rep. 831; s. c. 18 Law J. Rep. (N. s.) Exch. 318.

[PARKE, B. The object of the Courts in staying actions in the Superior Courts, when brought for less than 40*s.*, is to prevent the bringing of frivolous actions; but an action is not frivolous when it is brought to recover 100*l.*, although there may be a tender reducing the amount below 40*s.*]

¹ 20 Law J. Rep. (N. s.) Exch. 20.

Taylor v. Bullen.

The effect of the finding of the jury in this case is, that the plaintiff ought to have accepted the sum tendered.

[ALDERSON, B. An action is not frivolous which is brought to try a question of tender; but if an action is brought to recover 40*s.*, there is nothing to try but what is frivolous.]

[PARKE, B. This is an action brought to recover a larger sum than 40*s.* The plaintiff knows nothing about a tender and payment into Court when he sues out a writ.]

In substance the action is brought for 16*s.*

PARKE, B. There is no ground for a rule. The question is, for what amount the action is brought. The application must be confined to a motion under the County Courts Act.

POLLOCK, C. B., and ALDERSON, B., concurred.

TAYLOR v. BULLEN.¹

November 13, 1850.

Warranty — Sale of Ship — Description.

The defendant, being the owner of a ship, inserted the following advertisement in the *Shipping Gazette*: "The fine teak-built bark *Intrepid*, A 1, 286½ tons register, built under particular inspection at Coringa, in 1842, of the best material, shifts without ballast, carries a good cargo, has a poop, and excellent height between decks, and is well adapted for a passenger ship; length 91½ feet, breadth 22 feet 8 inches, depth 16 feet 8 inches; now lying at the St. Katherine Docks. For inventories and further particulars apply to J. H. Arnold, 3 Clement's Lane, Lombard Street."

The plaintiff, having seen the ship, entered into a written agreement to buy her, "as she now lays in the St. Katherine Docks, agreeable to the inventory annexed." This document commenced thus: "For sale by private contract the fine teak-built bark, *Intrepid*," &c., pursuing the terms of the advertisement down to the words "St. Katherine Docks." Then followed this statement: "Hull, masts, standing and running rigging, with all faults as they now lie." Under this was the word "inventory," which was followed by a list of the ship's stores and tackle; and the document concluded with these words: "The vessel and her stores to be taken with all faults as they now lie, without any allowance for deficiency in length, height, quantity, quality, or any defect or error whatever. For inventories and further particulars apply to J. H. Arnold, 3 Clement's Lane, Lombard Street, London."

The defendant signed his name to this inventory, opposite to the list of the ship's stores. The vessel proved not to be teak-built, nor of class A 1, nor adapted for a passenger ship:—

Held, First, that the contract of sale incorporated the whole of the above document, and not merely the list of stores headed "inventory."

Secondly, that the defendant was not guilty of a breach of warranty.

ASSUMPSIT for a breach of warranty on the sale of a ship.

The first count of the declaration alleged that the defendant fraudulently represented that the said ship was teak-built, was entitled to be classed as A 1, and was well adapted for a passenger ship, and then averred that the ship was not teak-built, nor entitled to be classed as A 1, nor adapted for a passenger ship.

Third plea, that the defendant did not warrant *modo et forma*. Issue thereon.

¹ 20 Law J. Rep. (n. s.) Exch. 21.

Taylor v. Bullen.

This action came on to be tried at the London Sittings after Michaelmas term, 1849, when a verdict was taken by consent for the plaintiff on the first count, subject to the opinion of the Court whether the facts stated in the following case entitled the plaintiff to maintain the verdict upon the third issue.

In 1849, the defendant, being the sole owner of the barque *Intrepid*, inserted the following advertisement in the *Shipping Gazette*: "The fine teak-built barque *Intrepid*, A 1, 286½ tons register, built under particular inspection at Coringa in 1842, of the best materials, shifts without ballast, carries a good cargo, has a poop, and excellent height between decks, and is well adapted for a passenger ship; length, 91½ feet, breadth, 22 feet 8 inches, depth, 16 feet 8 inches, now lying in the St. Katherine Docks. For inventories and further particulars apply to J. H. Arnold, 3 Clement's Lane, Lombard Street." The plaintiff having read the advertisement and seen the ship, negotiated, by F. J. Mercer, his agent, for the purchase of the vessel, and the following contract was signed by Mercer and the defendant: "F. J. Mercer agrees to buy and Capt. Bullen agrees to sell the barque *Intrepid*, as she now lays in the St. Katherine Docks, agreeable to the inventory annexed, for 2,200*l*."

" Robert Bullen,
" F. J. Mercer."

The paper mentioned in the said contract as the "inventory annexed," was a partly written and partly printed paper, of which a fac-simile copy accompanies this case, and is to be taken as part thereof. The paper was as follows:—

"For sale by private contract, the fine teak-built barque *Intrepid*, A 1, 286½ tons register, built under particular inspection at Coringa in the year 1842, of the best materials: shifts without ballast, carries a good cargo, has a poop, and excellent height between decks, and is well adapted for a passenger ship. Length, 91½ feet; breadth, 22 feet 8 inches; depth, 16 feet 8 inches; now lying in the St. Katherine Docks. Hull, masts, yards, standing and running rigging, with all faults, as they now lie."

The above particulars were printed, and underneath was also printed —

"Inventory: Anchors, 2 bowers, 1 best do., 1 small do." Here followed a long list of articles, under different heads; cables, sails, carpenter's stores, boatswain's stores, gunner's stores, ship-chandler's stores, "1 barometer" (in writing), cooper's stores, cook and cabin stores, provisions, boats. At the foot of which was added, "The iron kentledge on board is not sold with the ship, being the property of the St. Katherine Dock Company. The vessel and her stores to be taken with all faults as they now lie, without any allowance for deficiency in length, height, quantity, quality, or any defect or error whatever. For inventories and further particulars, apply to J. H. Arnold."

Taylor v. Bullen.

The signature of the defendant in the margin was opposite the list of articles. A bill of sale was afterwards duly executed.

The plaintiff's point for argument was, that the documents set out and referred to constituted a warranty of the ship in the terms of the declaration. The contrary was maintained by the defendant.

Cowling, (*Lush* with him,) for the plaintiff. The plaintiff is entitled to succeed in this case, for the defendant gave a warranty of the vessel; and the vessel not being a teak-built ship, the warranty was broken. The ship was sold according to the "inventory," which means the *whole* of that paper which was signed by the defendant in the margin, and this paper constitutes the contract between the parties.

[POLLOCK, C. B. The meaning of that document is, that the defendant merely describes the vessel, states that she is to be taken with all her faults, and that he will not warrant her.]

It is submitted that the meaning is, that the vessel is to be taken with all the faults she may have, consistently with her being a teak-built ship.

[PARKE, B. Supposing the defendant had intended not to warrant the ship, I do not see what other words he could have used for that purpose, unless he had said in express terms, "I will not warrant"]

Shepherd v. Kain, 5 B. & Ald. 240, is exactly in point. There an advertisement for the sale of a ship described her as "a copper-fastened vessel," adding that she was to be taken with all faults, without any allowance for any defects whatsoever; and it appeared that she was only partially copper-fastened, and it was held that, notwithstanding the words "with all faults," &c., the vendor was liable for the breach of the warranty. There the Court said, "The meaning of the advertisement must be, that the seller will not be responsible for any faults which a copper-fastened ship may have. Suppose a silver service sold 'with all faults,' and it turns out to be plated, can there be any doubt that the vendor would be liable? 'With all faults' must mean with all faults which it may have consistently with its being the thing described. Here the ship was not a copper-fastened ship at all."

[PARKE, B. The words of the present contract are rather more extensive than they were in that case; they are "without any allowance for any error."]

In *Kain v. Old*, 2 B. & C. 627; s. c. 2 Law J. Rep. K. B. 102, where the same question arose, although the case was decided on another ground, nothing is said by the Court to invalidate the decision in *Shepherd v. Kain*. In *Shepherd v. Kain*, the ship was sold as per inventory. The facts in *Freeman v. Baker*, 5 B. & Ad. 797; s. c. 3 Law J. Rep. (n. s.) K. B. 17, resemble the present, although the decision does not trench upon this case, for the Court there said that the word "inventory" in the contract referred only to the list of stores, &c., and not to the prior part of the advertisement; but in the present case, the whole paper, and not merely the list of stores, is called the "inventory." He also cited *Pickering v. Dowson*, 4 Taunt. 779.

Taylor v. Bullen.

Barstow, for the defendant. This case falls within the authority of *Freeman v. Baker*; for the whole of the paper which is called the "inventory" is not incorporated in the contract of sale, but merely the "list of stores." The paper is called the "inventory" merely for the purpose of identifying it. At all events, the word "error" at the end of the document can refer to the description of the articles in the list only, and therefore the defendant cannot be said to have warranted the vessel to be "teak-built." The words "one barometer" are in ink instead of being printed, and that shows that the list only, and not the whole paper, was referred to.

Cowling, in reply, referred to *Cross v. Eglin*, 2 B. & Ad. 106; s. c. 9 Law J. Rep. K. B. 145.

[*PARKE, B.*, mentioned *The Duke of Norfolk v. Worthy*, 1 Camp. 337, and *Wright v. Wilson*, 1 Moo. & R. 207.]

POLLOCK, C. B. I think the defendant is entitled to judgment. The question is, whether the defendant gave any warranty at all. The present case is distinguishable in some of its features from the other cases that have been cited. Assuming that the whole of the printed paper is attached to the contract, it is stated that the vessel and her stores are to be taken with all faults, without any allowance for deficiency in length, height, quantity, quality, or any defect or error whatsoever. I do not impeach the authority of the cases that have been cited. In *Shepherd v. Kain*, the words "with all faults" were held to mean all the faults that the vessel might have consistently with its being the thing described. It was not, however, a copper-fastened ship at all. In the present case, the vessel is sold with all her faults, defects, and errors. It is alleged that the vessel was teak-built, was of the class A 1, and was adapted for a passenger ship; whereas it appears that she did not answer any of these allegations. When the defendant says he will warrant nothing, and there is no fraud, and the vessel is described as teak-built, &c., the question is, whether that description falls under the head of "error," for if it does, the plaintiff clearly cannot recover, as error is one of the things guarded against by the contract. The substance and meaning of the transaction is this, and the defendant may be supposed to have used this language to the plaintiff: "The teak-built barque, the *Intrepid*, now lying in St. Katherine Docks, A 1, I describe in certain terms, but I warrant nothing; I point out what I intend to sell; go and look at her; get the inventory; compare and judge for yourself; but understand clearly that I do not warrant her." The defendant may, in fact, be considered to have stated expressly that he will warrant nothing, and that whatever description of ship the vessel may happen to be, no recourse shall be had against the seller, unless there be fraud; and no fraud exists in this case.

PARKE, B. I am of the same opinion. The question is, whether the averment in the first count of the ship being teak-built, A 1, and adapted for a passenger ship, is proved. The defendant subscribed the agreement, and the point for our consideration is, whether this is a warranty or not. It is said that this case resembles *Freeman v. Ba-*

ker, and that the defendant's intention merely was to incorporate in the contract the list of the ship's articles only, and not the other particulars that appear in the paper, which was signed by the defendant. The case of *Freeman v. Baker* is certainly like the present case. There we held that the entire paper which contained the list of articles was not incorporated in the contract. This case, however, is stronger; for here the parties meant to import into the contract of sale the description of the vessel as well as the list of ship's articles, and the defendant signed the paper. It is endeavored to explain this difficulty by referring to the introduction of the term "one barometer" in writing. I think, however, that the defendant meant to sell according to the terms of the inventory. If there had been no memorandum at the bottom of the paper, the parties would have intended that the vessel was a teak-built ship, A 1, and a passenger ship; and if the terms of the memorandum had been that the vessel was to be taken with all her faults, without any allowance for any defect, that being the only word of that kind used, we should have held, on the authority of *Freeman v. Baker*, that the defendant was bound to show that the ship was teak-built, A 1, and a passenger ship. But the word "error" at the end of the inventory was introduced for further protection. Under the contract as it now stands, it must appear that the vessel is a "barque," but if there is any misdescription of her it was intended to be covered by the word "error." Therefore, although the case is not quite free from doubt, I think if we look at the whole inventory, the misdescription of the vessel is protected by the introduction of the word "error."

ALDERSON, B. The contract in this case has reference to the paper annexed, and the whole paper forms part of the bargain. The parties agree that the contract is to be according to the inventory, that is, according to the paper, which contains certain terms as well as the list of ship's stores. That is the meaning of the word "inventory." An inventory may apply to the person of the individual as well as to those parts of his dress and other matters which are particularly specified. In this sense it is used in Shakspeare: "It (my beauty) shall be inventoried, and every particle and utensil labelled to my will." The description of the vessel, therefore, forms part of the inventory. But then to the whole of the document is attached a qualification that any error is to be allowed for. Now, in this case there is an error in the description of the vessel, for she is not, as she is described, teak-built. *Shepherd v. Kain* merely decided that allowance to be made for all "faults" did not extend to a statement that she was copper-fastened, when in truth she was only partially so. — *Judgment for the defendant.*

Knight v. Fox & Henderson.

KNIGHT v. FOX and HENDERSON.¹

November 5, 1850.

Master and Servant — Sub-contractor — Liability of Principal.

A railway company entered into a contract with A to construct a branch line; A contracted with B to erect a tubular bridge, parcel of the works. B had a surveyor, C, whom he paid by a salary of 250*l.* a year to attend to his general business; and after obtaining the contract for the bridge, contracted with C to provide the necessary scaffolding, for which he was to receive 40*l.* irrespective of his salary, B to furnish the requisite materials, including lights. One of the poles of the scaffold rested on a highway, and owing to the want of sufficient light to warn the passers-by, D stumbled over the pole and was injured; subsequent to which additional lights were placed on the spot, and B paid for them:—

Held, that B was not liable, and that D's remedy lay against C.

THE declaration alleged that the defendants were, by themselves and their servants, in the course of erecting a railway bridge and viaduct over and across a public street and highway, and for that purpose had erected a scaffold in and upon the said highway; and it then became and was the duty of the defendants to perform the said works and erect the said scaffold in a careful and proper manner, and to take due and proper precautions against injuries happening to persons lawfully passing along and using the said highway. It then proceeded to state that the defendants did not regard their duty in that respect, and by themselves and their servants carelessly, negligently, and improperly placed and fixed a large piece of timber upon and across the footpath of the said highway, and kept it there, by night and day, without any light or other guard or precaution to warn passengers of the same being there, or to prevent them falling over it; whereby the plaintiff, who was in the night-time lawfully passing along the said highway and the footpath thereof, stumbled over the said piece of timber, and was thereby thrown down and injured. Pleas—the general issue; and that the defendants did not, either by themselves or their servants, erect the scaffold or fix the piece of timber. At the trial, before Pollock, C. B., it appeared that the London and Blackwall Railway Company being desirous of constructing a branch line from Stepney to Bow, entered into a contract with a person of the name of Brassey to effect the necessary works; who thereupon made a sub-contract with the defendants (Fox and Henderson) to construct a portion of them, namely, a tubular bridge, principally of iron, to go across a public highway. The defendants resided at Birmingham, and a surveyor, of the name of Cockrane, was employed by them to manage their business in London at a salary of 250*l.* a year; but on obtaining the contract for this bridge, they entered into a contract with Cockrane that he should supply the scaffolding required for that work, they furnishing the necessary materials, including lights, and for this they agreed to pay him 40*l.* irrespective of his general salary. In building the bridge, it became necessary to erect a scaffold with one of its poles resting on a sleeper

¹ 20 Law J. Rep. (N. S.) Exch. 65. 14 Jur. 963.

fixed to the pavement of the highway. A solitary light was placed at night to warn passengers of this obstacle, but this being insufficient for the purpose, the plaintiff fell over it and broke her leg. Additional lights were then placed to guard against further accidents, and the defendants paid for them. On this state of facts, it being objected that Cockrane was liable, and not the defendants, the Judge directed a nonsuit, reserving leave to the plaintiff's counsel to move to enter a verdict. It was also agreed that if there was any mode of putting the case to the jury in which they might fairly have found the defendants liable, they should be taken to have so found.

Knowles moved accordingly. A series of cases, recently reviewed by this Court in *Reedie v. The North-western Railway Company*, 4 Exch. 244; 13 Jur. 659, have settled that where a party contracts to do work for another, the employer is not liable for injuries occasioned by the servants of the contractor in the prosecution of the work. But the present case differs in this, that the contractor here was also the *general servant* of his employers, the defendants. [*Parke, B.* — *Quoad* the fitting and managing of the scaffold, he was not the servant of the defendants. It is like the case of a gentleman contracting with his servant to supply him with job horses.] Contracting with the servant to supply his own whip would be more analogous; for here the bridge is the principal thing and the scaffold only an accessory. If a servant who by agreement with his master is to find his own tools, were to leave any of them, such as a tub or ladder, in a dangerous place, in consequence of which a third party is injured, the master would not be excused. [*Alderson, B.* — Suppose this contract, instead of being made with Cockrane, had been made with a third person altogether; could there be any doubt then that the defendants would not be liable for this accident? Then how does the fact of Cockrane being their general servant and surveyor make any difference?] As Cockrane had the general management of the defendants' business in London, it was his duty to provide the scaffold, and the giving him 40*l.* for it was only paying him by the piece. At all events, the circumstance of the defendants having paid for fresh lights to protect the public from similar accidents was some evidence from which the jury might have inferred their liability. [*Pollock, C. B.* — Could not any person of common feeling have done that without rendering himself responsible?] Philanthropy does not carry persons so far as to induce them to protect the public at their own expense. [*Alderson, B.* — It would be dangerous to ignore public spirit in that way. Why may not a man do something for the good of the public? *Pollock, C. B.* — It would be rather a hardship if a man were to be made liable for showing common humanity. Suppose a gentleman travelling with post horses, his postilion runs over a man, and the gentleman takes the wounded person to a hospital and procures every assistance for him.] That is not done from public spirit, but in consequence of a person's feelings being worked on at the moment. In *Burgess v. Gray*, 1 C. B. 578; s. c. 14 Law J. Rep. (N. S.) C. P. 184, the defendant, who was the occupier of prem-

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ises adjoining a highway, employed a person named Palmer to make a drain therefrom to communicate with a common sewer. In the performance of this the servants of Palmer placed a quantity of rubbish on the highway, which occasioned an accident to the plaintiff. The only evidence that the defendant interfered was that he had applied to the commissioners for leave to break into the sewer, and a policeman said that on his calling the defendant's attention to the rubbish, he said he would remove it as soon as he could; and also that after the accident happened, the defendant said he could prove it was occasioned by the plaintiff's own negligence. On these facts, Tindal, C. J., left it to the jury to say whether the defendant wrongfully placed or caused to be placed the earth on the highway; and this ruling was upheld by the Court of Common Pleas. Erle, J., there said, "Even if the defendant had parted with the whole control to Palmer, I am at a loss to know why he should not be liable jointly with Palmer." [Pollock, C. B. — According to that you might have sued Brassey, Fox, Henderson, and Cockrane all together.] The plaintiff's right to bring this action is also maintainable, on the ground that the act done amounts to a nuisance. In *Reedie v. The North-western Railway Company*, it having been suggested that there might be a distinction in point of law between fixed property and ordinary movable chattels, the Court in giving judgment said, "On full consideration we have come to the conclusion that there is no such distinction, unless perhaps in cases where the act complained of is such as to amount to a nuisance." [Parke, B. — That means a nuisance existing in a man's house or on his property: as for instance if this bridge belonged to the defendants, and something fell from it on the head of a passer-by, then it would be a question whether the defendants might not be liable.] We will rest on the other point.

PARKE, B. No rule ought to be granted in this case. The act complained of was not at all done by Cockrane in the character of a servant of the defendants. Perhaps it is too strong to say that he was their servant at all,—he was a contractor or surveyor, receiving 250*l.* a year, instead of being paid for each separate piece of work. As to the construction of the scaffold, it is therefore the same as if the defendants had contracted with any one else to make it.

ALDERSON, B. I am of the same opinion. The only real question is, whether the negligent act which caused the injury to the plaintiff was the act of Cockrane, as servant of the defendants, for if so, they are responsible for that injury. But on the evidence it appears that Cockrane, when he did that negligent act, was acting as a sub-contractor, and did it on his own account. The defendants were not concerned in the matter, and the plaintiff's action should therefore have been brought against him.

POLLOCK, C. B. I agree there ought to be no rule. At the trial, though I was very anxious that there should be no failure of justice, I

was at the same time desirous that the law should not be made to bend to hard cases, but that whatever was the rule of law should be followed. Probably the fact of Brassey being the immediate contractor with the company was of some service in protecting the defendants; for the jury put several questions, and had considerable difficulty in yielding to the law which I laid down. But they could not fail to perceive, what struck me strongly, that if Brassey, who took the contract from the company in the first instance, was to be exonerated by his sub-contract with the defendants, they, on their parts, had an equal right to say, we have handed our obligation over to Cockrane. However, the course I took was to direct a nonsuit, with leave to enter a verdict, if the Court should think there was any evidence to go to the jury of liability in these defendants,—which, of course, means any evidence that would reasonably conduct to that conclusion. No doubt, taking the case as it stands, you may, by rejecting some of the evidence and perverting the rest, make out enough to persuade a jury to find for the plaintiff sooner than let her go uncompensated for the injury she received. But it is otherwise when you examine all the evidence; and I may here remark, that when compensation is to come from the pockets of others, people are extremely liberal in awarding it. This case is distinguishable from *Burgess v. Gray*. There, a single matter,—a remark made by the defendant,—went to the jury, unexplained by other testimony; and, possibly, if we knew nothing more of these lights than that the defendants paid for them when they were put up after the accident, it might be some evidence that they were convinced they were liable for the injury which had occurred, and, consequently, some slight evidence to lead the jury to a like conclusion. But, taking the whole of the evidence together, that fact is explained by the circumstances, that Cockrane was not to find any of the materials for the bridge,—that he had made a contract that the defendants were to find the materials for it, he to furnish the labor, and be paid a specified sum for that job,—that his taking this contract formed no part of and had nothing to do with his general employment by the defendants; and that those lights were thus paid for, because they were considered as part of the materials supplied.—*Rule refused.*¹

¹ The rule is well established that a master or principal is civilly liable for the negligence of his servant or agent in the course of his employment, but the later English authorities have denied the application of such a rule, where the relation is that of principal contractor and sub-contractor, and now seem to uniformly hold that such principal contractor is not responsible for the wrongful acts or negligent conduct of servants employed by such sub-contractor in the prosecution of the work, and the former cases of *Bush v. Steinman*, 1 B. & P. 404, and *Randleson v. Murray*, 8 Ad. & El. 109, have been denied to be

law. See *Quarman v. Burnett*, 6 Mees. & Wels. 499; s. c. 9 Law J. Rep. (n. s.) Exch. 308. *Rapson v. Cubitt*, 9 Mees. & Wels. 710; s. c. 11 Law J. Rep. (n. s.) Exch. 271. *Milligan v. Wedge*, 12 Ad. & El. 737; s. c. 10 Law J. Rep. (n. s.) Q. B. 19. *Allen v. Haywood*, 7 Q. B. 960; s. c. 15 Law J. Rep. (n. s.) Q. B. 99. *Reedie v. North-western Rail. Co.*, 4 Exch. R. 244; s. c. 13 Jur. 659. And this although such sub-contractor was also at the same time the general servant of his employers, or although the principal contractor reserved the right to discharge the workmen employed by the sub-contractor, if dissatisfied

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DEVEREUX v. THE KILKENNY AND GREAT SOUTHERN AND WESTERN RAILWAY COMPANY.¹

November 23, 1850.

Joint-stock Company — 8 Vict. c. 16 — Scire Facias — Shareholder.

The mode of issuing execution against a shareholder in a joint stock company, under the 8 Vict. c. 16, s. 36, may be by *sci. fa.*: *sed quære*, whether it might not be in some other form?

Such *sci. fa.* should state that the party against whom it issues is a shareholder in the company, together with the amount due on his shares; and also that execution has issued against the property of the company and been found unavailing to satisfy the plaintiff's claim; all which allegations are traversable.

PEACOCK moved for execution against Mr. George Emery, a shareholder in the Kilkenny and Great Southern and Western Railway Company. The application was grounded on the 36th section of the Companies Clauses Consolidation Act, 8 Vict. c. 16, which enacts that "if any execution, either at law or in equity, shall have been issued against the property or effects of the company, and if there cannot be found sufficient whereon to levy such execution, then such execution may be issued against any of the shareholders to the extent of their shares respectively in the capital of the company not then paid up: provided always that no such execution shall issue against any shareholder, except upon an order of the court in which the action, suit, or other proceeding, shall have been brought or instituted, made upon motion in open court, after sufficient notice in writing to the person sought to be charged; and upon such motion such court may order execution to issue accordingly; and, for the purpose of ascertaining the names of the shareholders, and the amount of capital remaining to be paid upon their respective shares, it shall be lawful for any person entitled to any such execution, at all reasonable times, to inspect the register of shareholders without fee." The company in question was incorporated by stat. 9 & 10 Vict. c. 360, which embodied in the usual form the Companies Clauses Consolidation Act, and others relating to railways. Although formed for the purpose of constructing a railway in Ireland, the company had an office in London, but the railway was never opened for business. The present action was brought to recover the amount of the bill of charges of a

therewith. On the other hand, it has been held in this country, that a railroad corporation is liable for the negligence of workmen employed by an individual who had contracted to construct a certain portion of the railroad for a stipulated sum. And the Court in giving judgment, per *Wilde, J.*, say, "The work was done for their (the railroad corporation) benefit, under their authority, and by their direction.

They are, therefore, to be regarded as the principals, and it is immaterial whether the work was done under contract for a stipulated sum, or by workmen employed directly by the defendants at day wages;" and the case of *Bush v. Steinman* was recognized as sound law. *Lowell v. Boston & Lowell R. R. Corporation*, 23 Pick. 24, 31. And see *The Mayor, &c. of New York v. Bailey*, 2 Denio, 433, 443.

local agent to the company, and after an appearance *sec. stat.* had been entered, and declaration filed, a judge's order was made by consent, on the 14th of July, 1849, to stay proceedings on payment of a certain sum; in default of payment, the plaintiff to be at liberty to sign final judgment and issue execution for the whole amount, with costs, &c. Default having been made, final judgment was signed in July for 1140*l.* 8*s.* 2*d.*, and a *fi. fa.* issued into Surrey; which was returned "*nulla bona*;" and a like return was afterwards made to a testatum into Middlesex. On the 23d January, 1850, it was agreed, in writing, between the plaintiff and the solicitors of the company, that he should be paid his debt by instalments, thus: 250*l.* on the 6th February, a like sum on the 20th May, and the residue on the 13th January, 1851; a copy of the register of shareholders in the company to be supplied to the plaintiff, and, in case of default in payment of any of the instalments, he to be at liberty to proceed against the shareholders, or otherwise. The first of these instalments was paid, but default was made in payment of the second. Mr. Emery, against whom this application was now made, to have execution for the unpaid balance, was a shareholder in the company, and constituted one of its first directors by the act of incorporation. It also appeared that he was chairman at a half-yearly meeting of the body, held on the 30th August, 1850, when a report was read, stating, *inter alia*, that, in consequence of calls not having been duly responded to, the directors were unable to free the company from its pecuniary engagements: that two judgments had been obtained against the company, — one at the suit of the present plaintiff, the other at that of a person named Hichens; — that the directors, unable to satisfy these suits, from the very limited funds in hand, had no alternative but to let the creditors take such steps to procure the fruits of their judgments as they might be advised: that the accounts of the company showed that a balance of 86*l.* remained to its credit on the 30th June, &c. Mr. Emery, on moving the adoption of this report, stated that if the shareholders had paid up the calls, they would have had ample funds in hand to meet all the liabilities of the company; that there were several parties in arrear, who could pay the calls if they thought proper to do so; that he had paid his calls when they were due, and so, he believed, had the other directors, and he thought it fair that those in arrear should now be called on to pay theirs.

Peacock said that he was willing to take execution in any form the Court might please to grant it; but that the Court of Common Pleas had held, two days previously, that in such cases it ought to be by *sci. fa.* *Hitchens v. The Kilkenny and Great Southern and Western Railway Company*, 20 Law J. Rep. (N. S.) C. P. 31; (*ante*, p. 357.) [Parke, B. — There certainly is a difference between the wording of this statute and that of the Banking Act, 7 Geo. 4, c. 46, s. 13. Like that statute, it enacts that no execution shall issue against individual members of the company, except upon an order of the Court, "made upon motion in open Court after sufficient notice in writing to the persons sought to be charged." It does not,

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however, stop there, but contains further words not to be found in the previous act, viz., "And upon such motion such Court may order execution to issue accordingly." But then, on the other hand, it does not adopt the clear and decisive language of the Joint-stock Companies Act, 7 & 8 Vict. c. 110, s. 68, which says that execution may issue by leave of the Court "without any suggestion or *sci. fa.* in that behalf." The legislature are supposed to know what they did the year before, and do not say in this statute that there shall be no necessity for a *sci. fa.*]

Slade showed cause in the first instance. The plaintiff is not entitled to execution in any form against Mr. Emery. In order to bring himself within the 36th section of this statute, a plaintiff must establish four things to the satisfaction of the Court: first, that the party against whom the application is made is a shareholder in the company; secondly, the amount of shares he has in the company; thirdly, the amount of calls unpaid on those shares; and fourthly, that there is no sufficient property belonging to the company, on which execution can be levied. Now, on the present affidavits these four points can at most be only collected by surmise. In order to see what is meant by the term "shareholder in the company," the 8th and 9th sections of the act must be looked to: the former of which enacts that "Every person who shall have subscribed the prescribed sum or upwards, to the capital of the company, or shall otherwise have become entitled to a share in the company, and whose name shall have been entered on the register of shareholders hereinafter mentioned, shall be deemed a shareholder of the company." Sect. 9 then provides that "the company shall keep a book, to be called 'The Register of Shareholders,' and in such book shall be fairly and distinctly entered, from time to time, the names of the several corporations, and the names and additions of the several persons entitled to shares in the company, together with the number of shares to which such shareholders shall be respectively entitled, distinguishing each share by its number, and the amount of the subscriptions paid on such shares, and the surnames or corporate names of the said shareholders shall be placed in alphabetical order; and such book shall be authenticated by the common seal of the company being affixed thereto; and such authentication shall take place at the first ordinary meeting, or at the next subsequent meeting of the company, and so from time to time at each ordinary meeting of the company." In *The Newry and Enniskillen Railway Company v. Edmunds*, 2 Exch. 118; s. c. 17 Law J. Rep. (N. S.) Exch. 102, which was an action for calls on shares, it was held that in order to prove a man a shareholder under this statute, his name must be on the *sealed* register; its having been inserted, even with his own consent, on the draft register, was insufficient; as he might have disposed of his shares before the register was made up. Even the sealed register itself fluctuates from year to year with the general meetings of the company. The second and third propositions may be disputed on the *sci. fa.*; which ought also to show how the plaintiff has used due diligence to have execution from the

effects of the company. Now, the return of *nulla bona* amounts to nothing, for it may in truth have been the act of the plaintiff's attorney. [Parke, B. — We have had this subject twice under our consideration on the Banking Act, 7 Geo. 4, c. 46. The first time was in the case of *Dodgson v. Scott*, 2 Exch. 457; 12 Jur. 521, before me. It was there sought to make a prior partner in a bank liable on a judgment against the bank; and with respect to the fact of a person's being a partner, my notion was that there could be no doubt that was a matter to be tried on plea to the *sci. fa.*, and I might therefore be less scrupulous in the decision to which I should come; and that the same would apply to the case of a party sought to be made liable as having been a partner at the time of the contract entered into. Then, however, there was another question, on which I threw out the intimation that, whether due efforts had been made to enforce the plaintiff's judgment against the parties primarily liable, *i. e.* the members of the company for the time being, was a matter altogether for the determination of the Court, and that I must decide it to the best of my power on the materials brought before me; and as it could not be questioned by any form of plea to a *sci. fa.*, I must take care to form a right judgment; and I came to the conclusion that that fact had been established in that case. Then there is a subsequent case which was considered by the whole Court, namely, *The Bank of England v. Johnson*, 3 Exch. 598; s. c. 18 Law J. Rep. (n. s.) Exch. 238, where this Court, consisting of the Lord Chief Baron, my brother Platt, and myself, entered into the consideration of this question; and our notion was that a *sci. fa.* under that statute against a member of the company at the time of the contract entered into with the plaintiff ought to state the prior execution against the members of the company for the time being, and that it was ineffectual. Now, by parity of reasoning, would it not be necessary here, under the present statute, to state in the *sci. fa.* a prior execution against the goods of the company, and that there was not sufficient on which to levy?]

Peacock, in reply. The sole object of a *sci. fa.* being to make a stranger party to the record, if that can only be done on certain terms, those terms should be set forth in the writ. Thus where an executor applies for a *sci. fa.*, he must allege in the writ that he is executor, and that allegation is traversable. The present case is not like those under some other acts, where judgment for the whole of the plaintiff's demand may be recovered against a shareholder, whether he has subscribed the full amount of his shares or not, leaving him to his remedy by contribution. The allegation that there is no property of the company on which the plaintiff could levy execution, might be traversed, and would be like the issue raised on a return of the sheriff that there were no goods of the defendant in his bailiwick on which he might have levied. [Alderson, B. — You should have endeavored to get your money in Ireland. For all we know, this company may have found a gold mine there.] We could not levy in Ireland, under this English execution. Besides, it is alleged in the affidavits, and is uncontradicted, that Mr. Emery said, at a

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meeting of the company, that they had no means of satisfying this judgment.

POLLOCK, C. B. This rule must be made absolute. It is an application under the 8 Vict. c. 16, s. 36, which received the royal assent in May, 1845. By virtue of that section the Court has power to award execution against any of the shareholders in the companies within the operation of that statute; which execution may be issued against any of those shareholders "to the extent of their shares respectively in the capital of the company not then paid up: provided always that no such execution shall issue against any shareholder except upon an order of the Court in which the action, suit, or other proceeding shall have been brought or instituted." We are told that on the day before yesterday the Court of Common Pleas decided that execution in the usual form cannot be issued in cases like this, but that there must be a *sci. fa.* Still, as on the present occasion the application is for a *sci. fa.* only, not for execution in any other shape, it is unnecessary to say any thing about that decision of the Common Pleas. On argument it might turn out that that decision is perfectly well founded, and for the reasons I shall state. The power given to the Court by this statute being to order execution, not to issue a *sci. fa.*, and this being a statutory power not in accordance with the course of the common law, a doubt might be suggested whether we could issue a *sci. fa.*; and I am therefore anxious to state my reasons for thinking we may do so, though we might, if we so thought fit, issue execution. Inasmuch, then, as the execution spoken of in this section is to issue upon certain conditions, *i. e.* certain matters being the foundation for it, it is manifest that the Court must have the power to investigate the truth of those matters suggested. It is like the case put by Mr. Peacock, of an executor coming for a *sci. fa.*, who must allege that he is executor, and that allegation may be traversed. It appears to me that as the Court must have the power to see that these matters are true; and as, if questioned, they may be submitted to the consideration of a jury, it is far better that that should take place by means of a traverse of an allegation in a *sci. fa.*, than by the Court directing an issue merely to try them as independent facts. Supposing, therefore, that the Court may issue execution, it may also issue a *sci. fa.*; and I state this with the view of excluding any inference that I either concur in or dissent from what is stated to be the opinion of the Common Pleas. Mr. Peacock asks not for execution, but for a *sci. fa.* I am clearly of opinion that he is entitled to have it, and this rule must therefore be made absolute. As to the decision of the Common Pleas which has been mentioned to us, to the effect that they could not issue an execution, but must issue a *sci. fa.*, I think it is extremely possible that that Court did not decide that under no circumstances could they do so. If they can, it is discretionary in them to say which they will issue; and on the present occasion I am by no means satisfied that a *sci. fa.* would not be the course best adapted to attain the ends of justice. The question whether execution might issue or not certainly forms no part of our judgment, but

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it may be observed that the previous act, the 7 & 8 Vict. c. 110, passed in September, 1844, expressly says, in its 68th section, that the Court, on motion or summons, may direct execution "without any suggestion or *sci. fa.* in that behalf." In the last statute, nothing is said about suggestion or *sci. fa.*, and it may be that the legislature, having once enacted in distinct terms that the Court may, by leave, permit execution to issue without suggestion or *sci. fa.*, and afterwards having used the language of the section before us, that if there cannot be found sufficient property of the company whereon to levy execution, such execution may be levied against the shareholders by leave of the Court where the suit shall be pending—it may be that the course of proceeding to which I have alluded, having been once adopted in express terms, the legislature considered it only necessary to use such terms as would lead, by implication, to the same conclusion. We need not, however, decide that point now; but I could not express my concurrence with the rest of the Court in granting this rule without guarding against any prejudice to the opinion that execution might be without a *sci. fa.*

PARKE, B. I am of the same opinion. The only question is, whether a *sci. fa.* should issue in this case—that is all Mr. Peacock asks for—and on the affidavits before us I think there is sufficient case to call on us to issue one. In that *sci. fa.*, I apprehend it will be necessary to state, according to the impression of this Court in *Johnson v. The Bank of England*, that which must come as preliminary matter before the Court exercises its jurisdiction at all by issuing a *sci. fa.* against a person who has not paid his calls, that execution at law has issued against the property of the company, and that there has not been found whereon to levy. That is a preliminary proceeding to give the Court jurisdiction to issue execution against an individual member of the company. This Court will exercise its jurisdiction according to their notion of the necessity for the remedy, and inquire if due pains have been taken to find out the property of the company; and therefore part of our inquiry must be to see that a former execution clearly has been issued; and a *prima facie* case must be made out that there is nothing on which to levy; on that we are to exercise our judgment whether a *sci. fa.* ought to issue. And to exercise that jurisdiction properly in this case, we are to inquire whether the plaintiff's debt could be levied on or satisfied from the *Irish* property of this company: as they probably have more in Ireland than in this country. Now, the statement of Mr. Emery that they had no property at all, is sufficient to warrant us in awarding this proceeding. Undoubtedly that *sci. fa.* will state that Mr. Emery is a partner in the company, who has not paid up his shares, and also the amount paid on each respective share; all those facts will be stated in the *sci. fa.*, and are traversable matters to be decided by a jury. It is enough to say that a *prima facie* case has been made out, and this rule must therefore be made absolute.

ALDERSON, B. It is clear that there is *prima facie* evidence as to

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the first three points ; all three of which may, if Mr. Emery so pleases, be put in issue. Then as to the fourth, it was properly much argued by Mr. Slade, and I thought at one time it would be successful, that in order to found the jurisdiction of the Court we must be satisfied that the point might be raised by *sci. fa.* how the party has endeavored in England to obtain satisfaction for his debt ; but that is in truth a matter for the discretion of the Court, as the issuing of the *sci. fa.* must depend on whether there is reasonable evidence of property elsewhere which might be made available for payment from the funds of the company. If, therefore, it had appeared that there was abundance of property in Ireland which the party ought to apply for to get there, I should say there ought not to be a *sci. fa.* under those circumstances. But as it appears that Mr. Emery made a speech stating that there was no property of the company either in England or Ireland, I think the discretion of the Court will be rightly exercised in acceding to the plaintiff's application.

PLATT, B. Not only should the *sci. fa.* go because it may go, but, in my judgment, because it must, and as otherwise great inconvenience would always arise. The facts in litigation between parties ought to be tried by a jury without the intervention of an issue, which is not pointed out by this statute ; they should not be tried by the Court, for it is not our duty to try those facts — our duty is to explain the law, and the jury are the proper persons to try facts. As to issuing a *sci. fa.* in cases like the present, there is no difficulty. A *sci. fa.* is in a certain sense an original action, but here it is in truth a continuation of an original cause — it is a *sci. fa.* on a judgment : which is a continuance of the old cause, giving the party against whom it takes place an opportunity of traversing the facts therein stated. I think, therefore, that this *sci. fa.* should go ; the facts before us are, in my judgment, quite sufficient to award some proceeding against Mr. Emery, and this rule must therefore be made absolute. — *Rule absolute.*

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November 12, 1850.

Joint-stock Companies Winding-up Act, 11 & 12 Vict. c. 45.

When a Judge's order is made under the Joint-stock Companies Winding-up Act, 11 & 12 Vict. c. 45, to stay proceedings until after the plaintiff shall have "made or exhibited proof" of his debt or demand before the Master in Chancery ; on allowance of that proof by the Master in Chancery the power of the Judge to stay proceedings is at an end.

Quære, whether for this purpose allowance of proof, or any other act, is necessary to be done by the Master in Chancery.

¹ 20 Law J. Rep. (N. S.) Exch. 18. 14 Jur. 1049.

J. R. CLARKE had obtained a rule to rescind an order of Maule, J. This was an action of assumpsit against the defendant as contributory to and shareholder in the Royal Bank of Australia. After it was commenced, an order was made by Knight Bruce, V. C., under the Joint-stock Companies Winding-up Acts of 1848 and 1849, for winding up the affairs of the company; and on the 25th April an official manager was appointed. On the 15th June an order was made by Alderson, B., to stay proceedings until after the plaintiffs should have "made or exhibited their proof" before the Master in Chancery. On the 17th June, the plaintiffs accordingly carried in and exhibited their claim, which was allowed and admitted on the 2d July: and on the 25th, Maule, J., on summons taken out by the plaintiffs, made the following order: "On hearing, &c., I order that this cause be tried in its turn, and that the stop order entered in the Marshal's book and list of causes be removed, the plaintiffs having exhibited their proof to the Master, pursuant to the order of Baron Alderson, dated the 15th June."

Bramwell showed cause. The question is whether the plaintiffs have complied with the requisitions of the Joint-stock Companies Winding-up Act, 11 & 12 Vict. c. 45, s. 73, which enacts, that "After the first appointment of an official manager no creditor or other person shall, except so far as the Master shall permit, have power to commence or to proceed with any action against the official manager or against the company, or any other person representing the same, or who is sued as a contributory thereof, until after proof, or exhibiting or making such proof as he may be able, of his debt or demand before the Master, as hereinafter mentioned; and it shall be lawful for any Judge of the Court in which such action shall be pending, upon summons taken out before him for that purpose, to order that all further proceedings in such action shall be stayed until after such proof shall have been made or exhibited before the Master." The right to sue the contributory to the company is, therefore, only suspended until proof of the plaintiff's claim has been made or exhibited before the Master in Chancery; which was done in this case before the Judge's order removing the stop to the action. The object of this enactment was to prevent collusion, by compelling all persons having claims against the company to prove them before the Master, and thus enable him to declare the proper dividend. This is not like a proceeding in bankruptcy, where the debtor obtains a certificate discharging him from the debt. [He was then stopped.]

J. R. Clarke, in support of the rule. The 73d section of this statute must be construed in connection with its general provisions, and being so construed the words "proof made or exhibited" must be taken to mean not the simple fact of offering proof before a Master in Chancery, (whether the same be allowed by him or not;) but that the plaintiff has also taken some reasonable steps to procure payment of his debt from the fund mentioned in the act. The object of the statute was to point out a mode of winding up the affairs of in-

solvent joint-stock companies, and provide a fund for the payment of their debts. The 5th section enumerates the cases in which a contributory is entitled to present a petition for a dissolution and winding-up of a company; the 5th head of which is, "If any action shall have been brought in any of her Majesty's Courts of Record against any contributory of a company for any debt or demand which shall be due or claimed to be due from or by such company, and such company shall not, within ten days after notice in writing by such contributory of such action shall have been served upon the company in manner hereinbefore directed with respect to any judgment-debt, have paid, secured, or compounded for such debt or demand, or have otherwise procured such action to be stayed, or shall not have indemnified the defendant to his satisfaction against such action, and all costs, damages, and expenses to be incurred by him by reason of the same." The 29th section vests all the assets of the company in the official manager; who by sect. 34 is to pay its debts out of the fund thus provided. By the 50th section, after the appointment of an official manager, all actions, suits, and other proceedings by the company, whether against contributories or not, shall be prosecuted in his name as nominal plaintiff on behalf of the company: and by the 52d section, in all actions, suits, or other proceedings pending against the company, his name shall be substituted for that of the defendant. The 60th section then enacts, that "no action, suit, or other proceeding in any of her Majesty's Superior Courts at Westminster or Dublin shall be instituted or brought or proceeded with by the official manager, whether against a contributory of the company or any debtor or other stranger thereto, but with the leave or according to the general direction of the Master, to be obtained in that behalf by the official manager, who shall accordingly apply for the same; and that no such action, suit, or other proceeding shall be proceeded with if the Master shall, by writing under his hand, direct that the same shall be stayed or discontinued: provided always, that the want of such leave as aforesaid shall not be set up as or in any wise constitute a defence to any such action, suit, or other proceeding." The 66th empowers the official manager to claim any balance due from contributories: by the 74th the creditors of the company making proof of their debts before the Master shall make proof in the same manner as debts are allowed to be proved in bankruptcy: and the 83d and 84th provide a mode for making calls on the contributories to supply a fund for paying the debts of the company. Actions against contributories to a company differ from other actions in this, that they are parties between whom and the plaintiff there is no privity, and who are liable solely in respect of holding shares in the company, and one object of the statute was to protect them against such actions. If it be objected that this is construing the words "proof made or exhibited" in a sense different from their primary one, the answer is that Courts of law constantly expound the words of acts of Parliament in different senses as circumstances require. Thus the expression "execution made, had, or levied," means sometimes the issuing of a writ, sometimes the delivery of it to the sheriff, sometimes the

actual seizure of the goods, and sometimes the actual sale of them and realization of the proceeds. So "goods for exportation" has been construed to extend to goods brought coast-wise to London: and the word "insolvent" is understood by the Courts sometimes in its popular and at others in its technical sense. [*Pollock*, C. B. — My brother Alderson suggests this — suppose a statute were to direct that if the defendant in an action became bankrupt, proceedings should be stayed until proof were made of the plaintiff's debt, would that mean until the plaintiff received his share of a dividend?] That would depend on the language of the statute taken all together. This statute is *in pari materia* with the 7 & 8 Vict. c. 110, the object of each being to render certain public companies liable in a particular way. Now the 68th section of that statute enacts that execution shall not be issued against any shareholder without leave of the Court; and the Courts never grant permission for this purpose unless the plaintiff shows that he has taken reasonable pains to obtain his remedy out of the funds of the company. In *Thompson v. The Universal Salvage Company*, 6 Dowl. & L. 465, s. c. 18 Law. J. Rep. (N. S.) Exch. 242, Parke B., in delivering his judgment, speaking of this statute, says, "The 73d section renders it necessary that all the creditors of an insolvent company should, in the first instance, prove their debts before a Master in Chancery, and endeavor to obtain payment through him." And Alderson, B., says, "It would be unjust to permit the plaintiff to proceed against these individual shareholders as long as the funds of the company remain unexhausted." [*Alderson*, B. — There the Court was exercising a discretion vested in it by statute. Here we are called on to lay down a rule of right.] The present proceeding being but a substitute for equitable jurisdiction in Chancery, the Court should exercise a reasonable discretion.

POLLOCK, C. B. The question is whether we are to stay proceedings between these parties, the plaintiffs having thus far complied with the stat. 11 & 12 Vict. c. 45, that they have made or exhibited proof of their claim before the Master in Chancery. Even in the absence of the 58th section I should have had no doubt whatever on the subject. It is an established general rule in all questions arising on the construction of statutes, never to take away a common law right of the subject unless it is very clear, so clear as to leave no doubt, that the Legislature so meant. In order, however, to see what this statute intended, let us look to the 58th section, which enacts that "except as is by this act *expressly provided*, nothing in this act contained, nor any petition or order under the same for the dissolution and winding-up or for the winding-up of any company, shall extend or enlarge, diminish, prejudice, or in any wise alter or affect the rights or remedies of creditors, or other persons not being contributories of the company, or the rights or remedies of creditors being also contributories, but being creditors of the company upon a distinct and independent account, whether against the company or against any of the contributories of the same, nor the rights or remedies of the company against any contributories or other persons, nor shall alter or

affect any contracts or engagements entered into by or with the company, or any person acting on behalf of the same, previously to any such petition, nor any actions, suits, or other proceedings pending at the date of such petition." Mr. Clarke has, therefore, not merely to satisfy us that what he contends for is reasonable, and intended by the statute, but that it is expressly provided by it, *i. e.* if not actually expressed, yet so clearly intended that the Court may see it to have been the meaning of the Legislature — a conclusion which I should very reluctantly adopt. The 58th section requires not merely that counsel should persuade us that the proceeding for which he argues was intended, but that what was intended is actually expressed. In my judgment it is quite clear that it is not expressed, and I think it was not intended.

PARKE, B. I agree. The question turns on the 73d section of the 11 & 12 Vict. c. 45, which empowers a Judge to stay proceedings upon summons taken out before him for that purpose, until after proof of his debt shall have been "made or exhibited" by a plaintiff before the Master in Chancery. The Judge has no power by this section to stay proceedings unless under one of two states of circumstances, "proof made" or "proof exhibited," by the former of which is meant until the Master has received and allowed the proof brought before him, and by the latter until the creditor has given to the Master all the proof he can of his right to be paid, as against the company. In either of these cases the Judge has power to interfere; and before the creditor can be allowed to go on with his proceedings in his action, one of those two things must be done. After proof has been made or exhibited, no power to stay proceedings is vested in the Judge by this act. Then the 58th section says that the rights of creditors are not to be restricted except where it is so expressly provided in the act; and it is impossible to say that there is any such provision affecting the express rights of the plaintiffs here. The power of the Judge is, therefore, at an end so soon as the Master has before him the proof thus made or exhibited; the effect of which will be to secure a means of enabling the Master to ascertain the number of the creditors of the company, and restrain any action brought by any of them until the names of all are known to him. He is then empowered to administer the assets of the company; and by the above means can see what calls will be required to meet the claims against it. It appears to me, therefore, that on the words of the enactment before us, the plaintiff creditor has now a right to go on with this action; and I cannot find any clause in the statute to induce me to put on these words any other than their ordinary construction. The case of *Thompson v. The Universal Salvage Company* is quite different from the present. That case depended on the 7 & 8 Vict. c. 110. The plaintiff there had obtained a verdict and judgment against a joint-stock company within that statute, and on his applying under the 68th section to have execution against a member without suggestion or *sci. fa.*, he was obliged to satisfy the Court that he had had recourse to all proper means to obtain satisfaction for his debt from the assets of the company, by

making or exhibiting proof of it before the Master, under the 11 & 12 Vict. c. 45. That was our construction of that section of that statute. Under the present statute an action can only be stayed by virtue of the 73d section, by which a limited power to do so is given to a Judge in one of two events, viz., proof made or proof exhibited; i. e. until the plaintiff has sought to obtain payment of his debt by doing all he could to satisfy the Master of its existence.

ALDERSON, B. I am of the same opinion, with one exception. I quite agree that the 73d section must be construed according to its plain words; but I doubt if allowance of proof by the Master in Chancery is at all essential to its operation. And my reason for that is, because that section says the proceedings are to be stayed until after proof of the plaintiff's debt or demand shall have been "made or exhibited before the Master;" and the 74th section says that the proof of the debts or demands of creditors of companies shall be made before the Master "by deposition or affidavit;" and the 75th section says that "the Master shall, upon proof made or offered and exhibited before him of the debts and demands due or claimed from or against the company, or any of them, either allow or disallow, or allow as claims only, such debts and demands respectively, according to the nature of the case and of the proofs adduced or exhibited before him, and shall, by writing under his hand, declare such allowance and disallowance, or such allowance as claims only;" so that proof must have been made before allowance. I therefore construe the words, "proof made or exhibited," thus: proof "made" means that the deposition shall have been laid before the Master, together with every thing necessary to complete the proof; and "exhibited" a tender of that which is to be afterwards completed by deposition. All that, however, makes no difference as to this rule, because here both the proof has been offered and allowance of it made. The Judge has, therefore, no power whatever to stay the proceedings beyond that limited time, (which I did in this case,) and that time having elapsed, his power lasts no longer. It would be a direct interference with the 58th section, if we were now to stay proceedings; for the 73d section says that they shall only be stayed for a limited time, and the 58th section says that, except as expressly provided by the act, the rights of a creditor shall not be affected by it.

PLATT, B. I quite concur with my brother Parke, except so far as qualified by my brother Alderson; for no act of the Master is at all necessary in such a case. The act of making or exhibiting proof is all that is required; the 74th section points out how that is to be done; and when that is done, the stay of proceedings is at an end. Much argument has been spent on *Thompson v. The Universal Salvage Company*; but that case is not confined to insolvent companies, and would have been decided in the same way, if the company there had been solvent; for the return of *nulla bona* made to the *fi. fa.* against the company would not have sufficed to induce us to issue execution against other parties, as the Court required to be satisfied that there had been a *bona fide* execution and attempt to recover against the

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funds of the company. The present case, however, depends entirely on the language of the 73d section of the 11 & 12 Vict. c. 45, which is as plain as language can be. — *Rule discharged.*

ELY v. MOULE and TOMBS.¹

December 6, 1850.

County Court — 9 & 10 Vict. c. 95 — Judgment — Service.

Where a party who has been duly summoned to answer a plaint in a County Court holden under the 9 & 10 Vict. c. 95, fails to appear, on which the cause is heard in his absence and judgment given against him, and drawn up to pay the plaintiff's demand with costs forthwith, execution may issue immediately without previous service of the judgment.

THIS was an action of trespass against two defendants, Moule and Tombs, for breaking and entering the plaintiff's dwelling-house, seizing and taking his goods and chattels, and converting the same. The defendant Moule pleaded, first, not guilty; secondly, that the goods were not the goods of the plaintiff; thirdly, that no notice of action had been given as required by the County Courts Act, 9 & 10 Vict. c. 95; and, fourthly, that the defendant had levied his plaint in the County Court of Worcestershire holden at Droitwich, against the plaintiff, for the recovery of a debt of 18*l.* 13*s.* 6*d.*: that the plaintiff, being duly summoned, did not appear, whereupon the defendant recovered judgment for that amount, together with 3*l.* 18*s.* 6*d.* costs, which said sums were by the Court ordered to be paid forthwith to the clerk of the Court at his office at Droitwich: that the plaintiff disobeyed the said order in this, that he did not pay the said sums, &c., or either of them, or any part thereof, to the clerk of the said Court at his office in Droitwich aforesaid, forthwith, but wholly omitted so to do; whereupon, and after default made in such payment, the said clerk, at the request of the defendant, issued a *fi. fa.* under the seal of the Court, as a warrant of execution to the high bailiff thereof, empowering him to levy on the goods of the plaintiff: by virtue of which the said high bailiff entered the said dwelling-house and seized and took the said goods, and levied the said sum of money by distress and sale, &c. On the three first of these pleas the plaintiff took issue; and to the fourth replied by admitting the matters of record therein referred to, with a traverse *de injuria absque residuo causæ*, &c., on which the defendant joined issue. The other defendant, Tombs, was clerk of the County Court at Droitwich, and pleaded similar pleas, on which similar issues were raised. At the trial, before Williams, J., it appeared that the defendant brought his plaint against the now plaintiff in the County Court in question, which came on to be heard on the 13th August, 1849; when the now plaintiff, although duly sum-

¹ 20 LAW J. REP. (N. S.) EXCH. 29. 14 JUR. 1070.

moned, not appearing to answer the plaint, the cause was heard in his absence, and the following order made:—

“In the County Court of Worcestershire at Droitwich.

[L. s.] “Between *John Moule*, plaintiff, and *John Ely*, defendant.

“Upon hearing this cause at a Court holden at the Court-house, Droitwich, on the 13th day of August instant, it is adjudged that the said plaintiff do recover against the said defendant the sum of 18*l.* 13*s.* 6*d.*, his debt, together with the costs of suit, amounting to the sum of 3*l.* 18*s.* 6*d.*, and it is ordered that the said defendant do pay the same to the clerk of the Court at his office in Droitwich forthwith.

“Given under the seal of the Court, this 13th day of August, 1849.

“BY THE COURT.

“SAMUEL TOMBS, Clerk.

“Attendance at the office from ten till four o'clock.”

The plaintiff lived nearly four miles from Droitwich, and about five P. M., on the same day, the bailiff went to his house and demanded payment, and on his refusing, levied execution on his goods, serving him at the same time with the order of the Court, and showing him the following warrant:—

“No. B. 142. In the County Court of Worcestershire at Droitwich.

John Moule, plaintiff, and *John Ely*, defendant.

“Whereas, at a Court holden at Droitwich on the 13th August, 1849, within the jurisdiction of the said Court, before Benjamin Parham, Esq., the Judge of the said Court, the plaintiff by the consideration and judgment of the said Court recovered against the said defendant the sum of 18*l.* 13*s.* 6*d.*, for a certain debt before that time due and owing to the said plaintiff, together with the costs of suit by the said plaintiff in that behalf expended; and whereas, the said defendant by an order of the said Court, bearing date the day and year aforesaid, was ordered to pay the said debt together with the said costs, amounting together to the sum of 22*l.* 12*s.* forthwith; and whereas, the said sum of 22*l.* 12*s.* has not been paid to the said plaintiff pursuant to the said order: these are therefore to require and order you forthwith to make and levy by distress and sale of the goods and chattels of the said defendant wheresoever they may be found within the district of the said Court, (excepting the wearing apparel and bedding of the said defendant or his family, and the tools and implements of his trade, if any, to the value of 5*l.*,) the said sum of 22*l.* 12*s.*, and also the costs of this execution, and to seize and take any money, bank-notes, (whether of the Bank of England or any other bank,) and any checks, bills of exchange, promissory notes, bonds, specialties, or securities for money of the said defendant which may be there found, or such part or so much thereof as may be sufficient for the satisfying of this execution, and the costs of making and executing the same.

“Given under the seal of the Court this 13th August, 1849.

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"To Francis Wyatt Dyer, high bailiff of the said Court and other the bailiffs thereof.

"Debt,	18l.	13s.	6d.
Costs,	3	18	6
Execution,	1	6	0
	23l.	18s.	0d.

"Notice.

"The goods and chattels are not to be sold until after the end of five days next following the day on which they may have been taken, unless they be of a perishable nature, or at the request of the said defendant."

Under these circumstances, it being objected that the execution was premature — that the party against whom it issued ought to have been previously served with the order of the Court so as to afford him reasonable opportunity of complying with it — a verdict was taken for the plaintiff on all the issues except those raised by the pleas of justification, with leave to the plaintiff to move to enter the verdict for himself on those issues. The damages were assessed at 30l.

Keating, during the term, having obtained a rule accordingly, —

Whateley and *Gray* now showed cause. The justification *as pleaded* was proved. Nothing is alleged in the plea respecting service of the order of the Court; and if that omission renders the plea bad, the plaintiff's remedy must be by motion for judgment *non obstante veredicto*. [*Alderson*, B. — Surely that is involved in the words "order" and "disobey;" for if service of the order be necessary to its validity, it must have been served before it could be disobeyed; and after verdict proof of the service must be taken to have been made at the trial. *Parke*, B. — Suppose it were necessary to plead a Judge's order: we know that by the practice it must be served before it becomes binding, so that if an issue were taken whether such an order was obeyed, that would probably mean that the Judge signed the order, and that it was served on the party; and after verdict such service would be presumed. The true point in this case is, whether the order in question is at all like orders which require service.] That point depends on the construction of the 9 & 10 Vict. c. 95, and is one of immense importance, as all the County Courts in the kingdom issue execution as it was done in this case. No previous demand of this money was necessary, and if it even were, the plaintiff's refusal to pay dispensed with it. The 94th section of that statute enacts that "whenever the Judge shall have made an order for the payment of money, the amount shall be recoverable in case of default or failure of payment thereof forthwith, or at the time or times and in the manner hereby directed, by execution against the goods and chattels of the party against whom such order shall be made," &c. And by the 80th section, "If, on the day named in the summons, &c., the defendant shall not appear, or sufficiently excuse his absence, or shall neglect to answer when called in Court, the Judge, upon due proof of service

of the summons, may proceed to the hearing or trial of the cause on the part of the plaintiff only, and the judgment thereupon shall be as valid as if both parties had attended." Suppose the defendant had appeared in the County Court and in presence of the Judge refused to pay, and an order to pay forthwith were made against him, it will hardly be contended that execution on that order might not issue against him at once: and it is difficult to see why by not appearing he is to be in a better situation. The object of the statute in enabling the Judge to order immediate payment, was to prevent parties from rendering execution nugatory by removing their goods. If this objection is to prevail, a fresh suit would arise in almost every case relative to the sufficiency of the notice before execution. *Wootton v. Harvey*, 6 East, 75, is an authority. Under the 42 Geo. 3, c. 90, which enables a magistrate to make an order for payment of servants' wages in certain cases, and directs that "in case of refusal or non-payment of any sum so ordered for twenty-one days after such determination, he may issue his warrant to levy the same by distress and sale;" and gives an appeal to the sessions: the twenty-one days having elapsed between the making of the order before the appeal, and also twenty-one days after it was dismissed before the warrant of distress issued, it was held that the magistrate was justified in issuing the distress order without proof of any new demand of the money subsequent to the order of Sessions on the appeal.

Keating and *Huddleston*, in support of the rule. It will not be necessary to contend that, under some part or other of this statute, the judge of a county Court might not make an order for the payment of money forthwith, so as to put in default a person circumstanced as the plaintiff is here. It is enough to say that whenever he makes, as he is empowered to do by the 93d, 94th, and 95th sections, an order for the payment of money, directing either the manner or place of payment, or the party to whom it is to be made, that order cannot be said to be disobeyed until the party against whom it is made has had notice of it, so as to render his compliance with its requisitions at least possible. Such orders resemble those of justices of the peace, which are of no force until served. *Rex v. The Justices of Lancashire*, 8 B. & Cr. 593; *Gibbs v. Stead*, Id. 528. [*Parke*, B. — The fallacy of your argument consists in treating this as a judge's order which requires to be served before it becomes binding. On the contrary, this is the judgment of a Court of record to pay so much for debt and so much for costs, and that that payment is to be made into Court at the office of the clerk at such a time, otherwise execution. That judgment is given in the constructive presence of the defendant; for when he does not appear, the statute enables the Court to deal with the case as if he were present; and if he loses any thing by not being there, it is his own fault. *Alderson*, B. — It is on that principle that there is no warrant for the execution of a man; because the sheriff is ordered in open Court to do it; or is supposed to be so ordered.] Even if the defendant were present at the hearing of his cause in the County Court, he would not know the amount of

the costs, for they remain unascertained until afterwards taxed by the officer; and no notice of taxation is given, as in the Superior Courts. [*Parke*, B. — We must presume that the amount of the costs was stated in open Court, as well as the amount of the debt.] Taking this to be a judgment of a Court, still, on principle, every judgment ought to be served. [*Alderson*, B. — Yes, and on principle, a man should give notice before he issues a writ of summons. Persons have said so, and urged how unreasonable it is to sue a man for a debt without making a previous demand of it. But this involves a fee; so that, in order to create a theoretical perfection, the unhappy defendant would be taxed with an additional charge. In some few instances, indeed, injustice might arise from the absence of such a demand, but in order to get rid of that you would inflict an additional fee on every defendant in thousands of causes.] If the defendant is not served with a judgment he will be saddled with the much heavier costs of execution. By the 78th section of the statute, it is directed that "five of the judges of the Superior Courts of common law at Westminster shall have power to make and issue all the general rules for regulating the practice and proceedings of the County Courts holden under this act, and also to frame forms for every proceeding in the said Courts for which they shall think it necessary that a form be provided, and also for keeping all books, entries, and accounts to be kept by the clerks of the said Courts, and from time to time to alter any such rules or forms; and the rules so made and the forms so framed shall be observed and used in all the Courts holden under this act." Under this section a series of rules and forms have been drawn up by the judges;¹ the 14th of the former of which directs that the preceding rules, except, &c., as to the mode of service of summonses to appear to a plaint, shall apply to the service of all summonses, judgments, orders, notices, and processes whatsoever, issuing under the authority of the said act, except where otherwise directed by the said act, or any rule under the authority thereof. [*Parke*, B. — I have a difficulty in understanding what the judges who framed those rules meant by service of judgments. *Whateley* here suggested that it probably related to the judgments in case of debts obtained by fraud, specified in the 99th and 101st sections of the statute.] But the general tenor of the statute as well as the rules framed by the judges show that the adjudications of the County Courts were not intended to be verbal like those of the Superior Courts, but to be reduced into writing in the form of orders. This appears from the language of the 94th section; from the judge's having drawn up a written form of order for the payment of money, (Form 23,) which is similar to the present, except as to the word "forthwith;" and from the schedule (D) of the statute allowing a fee to the high bailiff for "serving every summons, order, or subpoena, &c." [*Alderson*, B. — That may mean intermediate orders.] The County Courts were intended for the administration of justice among the lower and ignorant classes, without professional assistance; and

¹ See those rules and forms, 11 Jur. part 2, pp. 73, 84.

supposing a defendant present in Court when judgment is pronounced, he could not be expected to carry away all the particulars of it in his head, especially if payment were directed to be made in a complicated series of instalments. Besides, the terms of the order in this case directed payment to be made at the office of the clerk of the Court between ten and four, but it was not served until a time of day which rendered compliance impossible until the next morning. [Alderson, B. — If the plaintiff had paid the money to the bailiff when he came with the execution, it would no doubt have been accepted, and the bailiff would be his agent to carry the money to the clerk of the Court.]

PARKE, B. This rule must be discharged. I had considerable reluctance in granting it, and only consented in order that a question so materially affecting the practice of the County Courts might be deliberately considered. It is one, no doubt, of very great importance; for if the plaintiff's counsel were to succeed in supporting their objection, the consequences would be very serious. If nothing can be done under an adjudication of a County Court, until there has been regular service of an order, it would be the means of creating great expense in endeavoring to serve such orders, and would give defendants an opportunity to escape payment by removing their goods before execution could be levied. It is therefore very fit to consider if such be the true construction of the statute. On full consideration of the question both on the argument to-day and since the rule to show cause was granted, I think there was no necessity to serve that order. For it is nothing but a judgment of the Court; and in all Courts the suitors of the Court are to take notice of judgments there given without any notice served upon them; and by the 80th section of this statute, a person who has been summoned to the County Court, and neglects to attend, puts himself in precisely the same position as if he were personally present at the hearing of the cause. It seems to me that this order directing the plaintiff to recover a certain sum with costs, specifying the time and place of payment, is in the nature of a judgment, not of a rule, and therefore, on the principle already stated, all parties who are bound to take notice of judgments in a Court are also bound to take notice of the amount of the sums adjudged to be paid, and of the times specified for payment, and if they do not comply with a judgment by paying within the time specified, the Court is authorized under the 94th section to issue execution. Now here the judgment of the Court is, that the plaintiff recover his debt with costs; by order of the Court part of the judgment is that they are to be paid "forthwith," and then on neglect of the opposite party, who is presumed to be present, for his not appearing is equivalent to it, to pay those sums, he is liable to have his goods taken. It is said, however, that the judges in one of the rules which they have framed under the authority of this act, have supposed that there are cases where judgments are to be served. Those rules so framed by the judges are not a judicial exposition by them of the statute, and do not bind us as if pronounced in open Court after

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having heard an argument on both sides; although no doubt their opinion would lead us to consider well the statute before coming to a decision. The rule referred to supposes that there are cases where orders are to be served, and where judgments may require to be served. As to orders, I feel no difficulty that if the Judge of the County Court chooses after judgment to vary by a subsequent order the time of payment specified in a judgment, that order, like a rule of the Superior Courts, must be served, and differs in that respect from a judgment pronounced in a Superior Court. I have looked in vain through the statute for a case where service is required of a judgment. It may be that the Judges speaking of all possible cases considered there might be some such, *e. g.* a Judge of the County Court might order money to be paid by the absent party within a certain time after service of the judgment upon him. I think what is here called an order is in truth part of the judgment, and every suitor must take notice of it. There is a well-known distinction which may illustrate this — where warrants of commitment are pronounced *sedente curia*, they are addressed to the officer of the Court, and there is no occasion for any written warrant, for every one present must take notice of them; but if not awarded in open Court they cannot be by parol, and there must be a regular warrant. Here I think the proceeding is in the nature of a judgment, of which the defendant had constructive notice, and has disobeyed: and I am glad to be able to come to this conclusion, for if proceedings in County Courts are to be entangled with all the formalities suggested by the plaintiff's counsel, their jurisdiction would be much less satisfactory, and greater difficulties would be thrown in the way of plaintiffs recovering their debts in those Courts.

ALDERSON, B. I am of the same opinion. I have a great respect for the authority of the Judges who drew up those rules; and think that in the one which has been referred to they acted *ex majori cautela* — they would not decide that in the working of the act there might not be some case in which it would be necessary to serve a judgment, and they therefore directed that if such a step should be necessary the judgment should be served in a given way. That was a much more convenient course than elaborately to go through the act in order to see if there were any such case. If there were no provision made for service in such a case, it would be a *casus omissus*; and there may be such a case, as for example, if an order were made to vary a judgment already given, it might be contended that it was a judgment or an order; so the Judges said at once, if it is to be served it must be served in a given way. I do not think they are to be taken as deciding judicially in the affirmative that it is a judgment, but if required to be served let it be in that manner. As to the question in general, we ought to make these Courts accord with those of the Superior Courts in this, that persons must take notice of what passes in open Court; and although there are evils attendant on the adoption of this principle, yet the general good effect of it will vastly overbalance them.

PLATT, B. In my opinion also it was not necessary to serve this order or judgment. For although taking on itself the name of an order, it is still neither more nor less than a judgment of the County Court on hearing the matter brought before them. It is remarkable that throughout this statute nothing is said about the service of any judgment—nothing. But with respect to the service of proceedings it is not silent, for with respect to the very commencement of a suit, the 59th section, after stating that a plaint shall be levied, says there shall also be a summons stating the subject of the action, and that it “*shall be served on the defendant* so many days before the day on which the Court shall be holden at which the cause is to be tried.” So again, in proceeding to recover possession of premises by ejectment, for which jurisdiction is given to the Court in the case of small tenements by the 122d section: there a summons is first of all issued to the party intended to be sued, and on proof of service of it the Court is authorized to issue a warrant to the bailiff to give the plaintiff possession at the end of seven and not more than ten days from the date thereof. There is no service of any order of the Court, but the warrant goes immediately to take possession of the premises, limiting the bailiff to a certain period within which he is to do the act. But then it is said the defendant is not sufficiently protected, if this execution can immediately issue against his goods. Not so, for by the 106th section a protection is thrown around any person against whom execution shall issue, by giving him the opportunity within five days of paying the money and saving his property—a protection which he would not have under an execution from this Court; as the sheriff might seize and sell the very next day. Then Mr. Huddleston has called our attention to the rules made by the Judges. Recollect how those rules were made. Persons conversant with the practice of these Courts compiled those rules, and laid them before Judges, who looked through them with caution. It may be that this word “judgment” slipped in through mistake; but nothing more surely could have been intended than that if a judgment requires to be served, the mode there pointed out is to be the mode of serving it. Then we have the schedule (D) of the statute, which is remarkable; for it speaks of fees to the high bailiff, and says there shall be fees for serving a summons, an order, or a subpoena, but says nothing of fees for serving a judgment; if service of that was contemplated there would have been a fee provided—instead of which we find it omitted specially, and an order mentioned which would require a service; thus showing that the statute never contemplated for a single moment service of a judgment. Where is the injury sustained by the defendant? He is summoned to appear; let him come; and if he does not let him take the consequence, and lose the benefit of his defence if he has one, though his absence seems to show he has not. It seems to me that the fair mode of stating the question is this: if an order made by a County Court is such as to be a rule of the Court, it is to be served; if a judgment, it need not be served.

MARTIN, B. I am of the same opinion. The real question is, is

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this a judgment? if so, it need not be served; if in the nature of a rule absolute, or order, it must be served. It is perfectly clear to me that it is a judgment, and the real utility of inserting in it the word "forthwith" was to show that no time was intended by the Judge to be given. The fallacy is as to what is the nature of a debt; when a debt is due, it is the duty of the debtor to be ready to pay it; and the creditor may bring his action for it without any demand. This was a debt the moment the judgment was given, and the law casts on the debtor the duty to be ready to pay; and as he cannot excuse himself by his absence, he is bound to be ready. It may be said this will lead to hardship, but that will be in one case in a thousand, for in 999 no proceedings are ever taken until the debtor has had ample opportunity of discharging the debt. I think therefore the present proceeding in the County Court was quite regular; and right glad I should be to prevent the extreme expense which would be occasioned by our holding the contrary—all which would fall on the unhappy debtor.

PARKE, B. It was open to the defendant in the County Court to have paid this money into Court. I do not dissent from what my brother Martin says, that he ought to have been there and ready to pay; because in this case the judgment was given before four o'clock in the afternoon, and therefore the money could have been paid into Court: but it will not be necessary to decide that.

ALDERSON, B. The truth is, that if the judgment were pronounced after four, P. M., a question would arise on the construction of the judgment whether the word "forthwith" did not mean after ten the next morning.—*Rule discharged.*

TURNER v. BERRY.¹

November 23, 1850.

County Court—9 & 10 Vict. c. 95—Suggestion—Payment.

A party who sues in a superior court for a sum exceeding 20*l.*, but in consequence of the proof of part payments recovers a verdict for less than that amount, will be deprived of his costs by the County Court Act, 9 & 10 Vict. c. 95, s. 129, unless the Judge by whom the cause is tried certifies that the action was fit to be brought in a Superior Court.

O'MALLEY had obtained a rule to deprive the plaintiff of costs under the County Court Act, 9 & 10 Vict. c. 95, s. 129. The action was brought to recover 60*l.* 14*s.* 7*d.* for work and labor and goods sold; to which the defendant pleaded the general issue and payment.

¹ 20 Law J. Rep. (N. S.) Exch. 89. 14 Jur. 1079.

At the trial, the plaintiff having proved his demand, the defendant proved several payments, reducing it to 16*l.* 9*s.* 11*d.*; for which a verdict was given; and the Judge did not certify that the case was one fit to be brought in a Superior Court.

J. O. Griffiths showed cause. By the 58th section of the 9 & 10 Vict. c. 95, the County Court is given jurisdiction over "all pleas of personal actions where the debt or damage claimed is more than 20*l.*, whether on balance of account or otherwise." The 129th section then enacts that "If any action shall be commenced in any of her Majesty's Superior Courts of record for any cause other, &c., for which a plaint might have been entered in any Court holden under this act, and a verdict shall be found for the plaintiff for a sum less than 20*l.*, if the said action is founded on contract, or less than 5*l.* if it be founded on *tort*, the said plaintiff shall have judgment to recover such sum only, and no costs, &c.; unless the judge who shall try the cause shall certify on the back of the record that the action was fit to be brought in such Superior Court:" and the question is, whether this section applies where the plaintiff at the trial proves a claim exceeding 20*l.*, but in consequence of the proof of payments, obtains a verdict for less than that sum. There is no direct authority on the point: but several cases have been decided on the construction of the old Courts of Requests Acts. Thus in *Harsant v. Larkin*, 7 B. Moo. 68, where a Court of Requests had jurisdiction to the amount of 40*s.*, the Court said, "The plaintiff's original debt was not to be referred to the verdict of the jury, but whether he had a fair, reasonable, and probable cause for litigating the question whether his demand amounted to more than 40*s.* or not." In *M'Collam v. Carr*, 1 B. & P., the Court refused to allow a suggestion for double costs under the Middlesex County Court Act, 23 Geo. 2, c. 33, where the original debt was above 40*s.*, but by a balance of accounts had been reduced below that sum: and Eyre, C. J., there said, "The action arises on a contract, part of which has been satisfied by money on account. Is there any case where the ultimate balance of an account only being under 40*s.* the Court has allowed a suggestion? I should pause upon such a case, since the most intricate points in accounts between merchant and merchant might by this means come to be decided before a County Court." In *Woodhams v. Newman*, 7 C. B. 654; s. c. 19 Law J. Rep. (N. S.) C. P. 213, the Court of Common Pleas held that the 129th section of the 9 & 10 Vict. c. 95, does not apply where the debt originally exceeding 20*l.* has been reduced below that sum by a set-off; and the reasoning of the Court in that case proceeds on the ground that it was never intended the County Court should try conflicting claims, the amount of each of which might exceed 20*l.* The difficulty arises chiefly from the introduction into this section of the words "whether on balance of account or otherwise," which are not to be found in the County Courts Extension Act, 13 & 14 Vict. c. 61. They cannot be construed as giving County Courts, which were meant for poor persons and small debts, power to investigate open accounts to any amount, however great;

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and must be understood to mean the balance of an account stated and settled between the parties, which creates a new debt easy of proof.

O'Malley, who appeared to support the rule, was not called on.

POLLOCK, C. B. This rule must be made absolute. The words "on balance of account" mean the balance of an account as struck at an investigation before a Court. It is argued that this will enable the County Court to try questions of disputed accounts; but even supposing those words were understood with reference to an account stated, the balance struck is not conclusive on the parties, as errors in the account might be shown. A set-off is a very different thing; for it is in the nature of a cross-action; and you cannot compel a man to set off his claim or accept credit for it against another.

PARKE, B. The argument founded on the words in the act "whether on balance of account or otherwise," is answered by Maule, J., in *Woodhams v. Newman*. He says that those words mean this: "Suppose a claim to be preferred in the County Court for a sum below 20*l.*, and it appears that the debt originally exceeded 20*l.*, but has been reduced by payment or otherwise before action brought, the defendant shall not be entitled to say that the case is without the jurisdiction of the County Court, because the debt originally exceeded 20*l.*" And the difference in this respect between payment and set-off is extremely well explained by my late brother Coltman in the same case, thus: "The cases decided upon the old Courts of Requests Acts seem to me to have a very considerable bearing upon this question. The principle they furnish is, that these Inferior Courts which were established for the recovery of debts and demands of small amount are not to assume themselves jurisdiction in a case which in point of fact involves the decision of two several actions of large amount. The words of the 58th section, which give the jurisdiction, give it in cases 'where the debt or damage sustained is more than 20*l.*, whether on balance of account or otherwise.' The cases undoubtedly show that the sum claimed is in general to be measured by the amount recovered by the verdict. But those were cases where the amount *really due* was shown before the jury to be less than the sum for which the plaintiff originally went, and not cases where the demand was reduced by a claim of set-off. They do not, therefore, apply to this case. I think this is a matter for which the plaintiff could not have levied a plaint in the County Court: and if so, it is idle to contend that he was precluded from suing in the Superior Courts." When therefore a plaintiff's demand is reduced by proof of payments, so that he recovers less than 20*l.*, he ought in general to pay the costs: but if, as undoubtedly may be the case, the proof of these payments involved a nice inquiry, or difficult investigation into debts of a larger amount than 20*l.*, the judge would set the matter right by his certificate.

The rest of the Court concurring. — *Rule absolute.*

Room v. Cottam.

ROOM v. COTTAM.¹

November 22, 1850.

County Court — Suggestion — Affidavit.

An affidavit for a suggestion to deprive a plaintiff of costs under the County Courts Act, 9 & 10 Vict. c. 95, ss. 128, 129, stated that at the time, &c., the plaintiff was residing and carrying on his business at A, within the jurisdiction of the County Court of B, and the defendant was residing and carrying on his business at C, within the jurisdiction of the County Court of D, and that the plaintiff "did not dwell more than twenty miles from the defendant:" —

Held insufficient, as not showing that the parties dwelt within twenty miles of each other.

The case of *Hayter v. Fish*, 6 Com. B. Rep. 568; 12 Jur. 1004, disapproved.

LUSH had obtained a rule, in the usual form, to enter a suggestion to deprive the plaintiff of costs, under the County Courts Act, 9 & 10 Vict. c. 95, ss. 128, 129. It was an action for goods sold and delivered; and the rule was granted on an affidavit of the defendant, therein described, as of "West Bromwich, Staffordshire," which stated that "the plaintiff was, at the time of the sale and delivery of the goods, and at the time of the commencement of this action, residing and also carrying on business at the corner of the Bull Ring and Moor street, Birmingham, which is within the jurisdiction of the County Court of Warwickshire, at Birmingham; that, at the time of the sale and delivery, &c., and, at the commencement of the action, this deponent was residing and carrying on business in West Bromwich, in the County of Stafford, which is within the jurisdiction of the County Court of Staffordshire, at Oldbury; that, at the commencement of the action, the plaintiff did not dwell more than twenty miles from this deponent, but within twenty miles of this deponent, i. e. within seven miles; that the cause of action arose in a material point within the jurisdiction of the County Court of Staffordshire, at Oldbury aforesaid, i. e. at West Bromwich, aforesaid, and within the jurisdiction of which said Court this deponent dwelt and carried on business as aforesaid, at the commencement of this action; and that the place where this deponent so dwelt and carried on business, and where the said goods, the subject of this action, were so delivered, was, at the commencement of this action, within the jurisdiction of the County Court of Staffordshire, at Oldbury aforesaid."

Joyce, on showing cause, objected to the sufficiency of this affidavit, — that it ought to be made to appear that the plaintiff dwelt within twenty miles of the defendant's place of residence, instead of which the affidavit only stated that he dwelt within twenty miles of the defendant. He cited *Johnson v. Ward*, 6 Dowl. & L. 720; s. c. 18 Law J. Rep. (N. S.) C. P. 255; *Duck v. Barton*, 1 L. M. & P. 201; 14 Jur. 153; and *Kirby v. Hickson*, 1 L. M. & P. 364; 14 Jur. 625, and stated that he was in the unreported case referred to by the Lord Chief Justice in the last of these. [He was then stopped.]

¹ 20 Law J. Rep. (N. S.) Exch. 24. 14 Jur. 1140.

Lush, in support of the rule. In stating that the plaintiff does not dwell more than twenty miles "from the defendant," this affidavit has used the very language of the 128th section of the statute; and there are several authorities that that is sufficient for a *prima facie* case, at least: *Butler v. Corney*, 2 Exch. 474; s. c. 17 Law J. Rep. (N. S.) Exch. 265; *Hayter v. Fish*, 6 C. B. 568; s. c. 18 Law J. Rep. (N. S.) C. P. 68. [Lush also stated that he was in a case on the first day of the present term, where the Court of Common Pleas ruled in accordance with *Hayter v. Fish*; but, in answer to a question from Parke, B., admitted that *Kirby v. Hickson* was not cited.] In *Peterson v. Davis*, 6 C. B. 235; s. c. 17 Law J. Rep. (N. S.) C. P. 290; also, where the affidavit did not mention the place of residence of the plaintiff, but only that he dwelt within twenty miles of the defendant's place of abode, the Court of Common Pleas allowed a suggestion to be entered in the terms of the affidavit. [Alderson, B. — Yes; but they afterwards held it bad on demurrer.] That case, however, was not under the County Courts Act, but the London Small Debts Act, the words of which are, "where the defendant resides, or carries on his business." In *Johnson v. Ward*, also, it did not appear *where* the plaintiff lived. [Alderson, B. — This affidavit only states that the plaintiff dwelt within seven miles of where the defendant was, not of the place where he dwelt. The more simple rule is to say, that in cases of this nature, the affidavit shall fulfil the real meaning of the statute, which every one concedes to be, that the dwelling-places of the parties must be within twenty miles of each other.] The defendant is described as of "West Bromwich," which is stated to be in Staffordshire.

PARKE, B. There are opposite decisions on the matter before us. There is *Hayter v. Fish*, where the Court of Common Pleas seem to consider it enough if a case be brought within the words of the statute, though not within its meaning. Subsequent authorities say that it is erroneous, and that it should be brought within its meaning. When the question came before the Common Pleas, in the first instance, in the case of *Hayter v. Fish*, they thought compliance with the words of the act sufficient, and that any thing taking the case out of its meaning must come from the other side. Now I certainly doubt the propriety of that, for the place of the defendant's residence is not a matter lying within the personal knowledge of the plaintiff; and it is consequently not right to throw on him the onus of explaining the defendant's affidavit on that subject. Since that decision, however, we have the considered judgment of the same Court, in *Kirby v. Hickson*, where Chief Justice Wilde gives his reasons for adhering to the opposite principle. And that is not a solitary decision; for he says, "I cannot distinguish that case (*Hayter v. Fish*) from the present one: but the point was expressly decided here a few days ago, when the Court was full, and I think that there should be no unnecessary deviation from what ought strictly to be required in every case. If we deviate a little to-day, we shall be asked to go a little further to-morrow, and confusion and unnecessary expense to

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the suitors must be the result. *Hayter v. Fish* certainly appears inconsistent with the recent case I mentioned; I must, therefore, elect between the two, and I think I ought to adhere to the later decision." Mr. Lush says that the Court of Common Pleas have since decided the other way, but it does not appear that their two former decisions were brought to their attention; and we ought, therefore, to adhere to *Kirby v. Hickson*. According to good sense, the defendant must bring himself, not merely within the words, but within the true meaning of the act, i. e. show that he and the plaintiff dwelt within twenty miles of each other.

ALDERSON, B. *Kirby v. Hickson* is supported by *Peterson v. Davis*, and by the case of *Duck v. Barton*, decided by me in this very Court; and which appear to have been overruled by the Court of Common Pleas without adverting to them.

PLATT, B., concurred.

On *Joyce* applying for costs, *Lush* observed there were conflicting decisions on the point.

Sed per Curiam. The usual rule must be followed.—*Rule discharged, with costs.*

BUCKLEY v. BARBER.¹

Hilary Term, January 11, 1851.

Jus accrescendi inter Mercatores — Partnership — Executor de son Tort.

The rule *jus accrescendi inter mercatores locum non habet*, applies to prevent a right of survivorship in partnership chattels.

The rule extends to manufacturers, and likewise to trade fixtures.

In our law, surviving partners have no *jus disponendi* in the partnership property, so as to enable them to mortgage the share of the deceased partner together with their own, as a security for a debt principally due from the surviving partners, and in part only from the deceased, and in order to enable them to continue their trade:—

And, *quære*, whether surviving partners have power to sell, and give a good legal title to the share belonging to the executors of their deceased partners, even when they sell an order to pay the debts of the deceased and of themselves.

The act of an executor *de son tort* is good against the true representative of the deceased, only where it is lawful, and such an act as the true representative was bound to perform, in the due course of administration.

THIS case was argued at the Sittings after last Trinity term, on the 21st and 22d June, before Parke, Alderson, Rolfe, (since created Lord Cranworth,) and Platt, BB., by

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Watson and Pickering, for the plaintiffs, and

Joseph Addison, for the defendant.

The nature of the case fully appears from the judgment of the Court, which was now delivered by

PARKE, B. The case was argued before us at the sitting after Trinity term. It involves some nice questions, as to which it is remarkable that the law should be left in any degree of uncertainty.

It came before us on showing cause against a rule to enter a verdict for the defendant, as to one third of the fixtures and machinery of a woollen mill, the whole of which the plaintiffs claimed as their property, and which was the subject of an interpleader issue.

The plaintiffs were the owners of a mill, occupied by a firm trading under the name of James Rhodes & Sons. In 1847 the firm consisted of Abraham, Samuel, and William Rhodes. William Rhodes contracted a debt with the defendant and died afterwards in 1847, intestate. Abraham, who had resided in America, came over after William's death, and he took possession of the mill and machinery, and carried on the business in it, without taking out letters of administration to William.

The plaintiffs afterwards distrained the machinery in the mill, some of which was, and some was not, by law distrainable; and instead of proceeding to sell to satisfy the rent, accepted a conveyance from Abraham on the part of the firm, of the fixtures and machinery, in satisfaction of the rent in arrear, (509*l.*) part of which (142*l.*) was due in the lifetime of William. The conveyance was dated the 11th June, 1849, and contemporaneously with it the plaintiffs executed a demise, or rather agreement for the demise, of the machinery and fixtures distrained, at a half-yearly rent of 12*l.*, with a proviso for the payment of 380*l.* by half-yearly payments of 50*l.*, or at once, and performance of the agreements, otherwise the demise to be void and the conveyance absolute. There was no evidence offered that the agreements were not performed and the instalments paid, and therefore the instruments, taken together, must be treated, not as an absolute conveyance, but as a mere mortgage.

The defendant afterwards brought his action against Abraham Rhodes, as executor *de son tort* of William Rhodes; recovered judgment, and took the conveyed machinery and fixtures in execution; and on a claim by the plaintiffs under the conveyance, an interpleader issue was directed, and tried before my brother Alderson at York; who directed a verdict for the plaintiffs, reserving leave to the defendant to enter a verdict for him, as to one third the aliquot portion of the partnership effects, belonging to the deceased partner, William, it being contended that his part belonged to his executors, on the principle that *jus accrescendi inter mercatores locum non habet*: and a rule *nisi* was granted for entering the verdict according to the reservation.

On showing cause, Mr. Watson and Mr. Pickering, for the plaintiffs, made several points.

First, that at law, the property in personal chattels, whereof merchants are jointly possessed for the purpose of trade, survives: and that the meaning of the above-mentioned maxim was, that though the legal property survives, the right to the benefit of it, and to bring an action of account against the surviving partner, belonged to the executors of the deceased partner.

Secondly, that the rule as to survivorship not taking place between merchants had no application to manufacturers — nor as to fixtures.

Thirdly, that if it had, and the property in the aliquot part of the deceased partner went to his executors, still that the continuing partners had a *jus disponendi*, which enabled them or any of them, acting without fraud, to dispose of it for the payment or satisfaction of the debts of the partnership, and that this conveyance was valid on that ground.

Fourthly, that the plaintiffs derived a good title, at all events, by the conveyance from Abraham, who was an executor *de son tort*.

With respect to the first question, it is singular that authorities should be found each way; but the weight of them greatly preponderates in favor of there being no survivorship as to the property in the joint *chattels*.

In the earlier books we do not find any trace of the doctrine of survivorship *inter mercatores*, in chattels, but some against the now admitted doctrine of survivorship as to remedies or choses in action.

The first cited is from the Year Book, 38 Edw. 3, 7, tit. "Accompt," (which is the authority mentioned in Br. Ab., "Joint-tenants," pl. 11.) There Kirton (a serjeant) arguing that in an action of account against a bailiff of two, (not merchants,) the executors of both ought to join, says, that if two merchandise in common, the executors of each shall have a moiety, so they ought in the case of an *action*. But Knyvet, J., says, "It is not alike of a chattel in possession and a chattel in action, for the action cannot be severed and his executors cannot join in the action with the other who survived." The language indeed is "l'aut ne poit my est' seve," but l'aut seems a false print — it may, however, mean the "other," or "latter," *i. e.* the chose in action. It is afterwards said that the writ, which was by the executors of the survivor, was adjudged good; and a sentence is added, which must be either a misprint, or refer to the right of *action* — it is said, "and this is the law of two merchants who have goods in common; if one die, the other shall have the whole by survivor."

The next authority is Lord Coke, 1 Inst. 182 a, who puts the joint wares and merchandise, *debts* and *duties*, of merchants on the same footing, and so does Noy, 55; and it is argued, that if they be on the same footing, as the remedy clearly survives, the title to the chattels does also. But Lord Coke clearly means, in the case of merchants, not to allow a survivorship in both wares and duties, but to disallow it in each; and it was afterwards made a question notwithstanding what is said in the Year Book, 38 Edw. 3, whether the survivor and executor of the deceased ought not to join in an action for a chose in action in the lifetime of the deceased. It was held by the Court in

Hall v. Hufham, 2 Lev. 188, in consideration of the authority of Lord Coke in this passage, that they ought to join in an action for goods sold by two joint merchants; also, there is a precedent in Lutw. 1493, of an action by the executors of a joint merchant joining with the survivor for taking the goods of the partnership in the life of the deceased. Subsequently, in the case of *Martin v. Crompe*, 1 Ld. Raym. 340; 1 Salk. 444, it was held to be clear, in accordance with the doctrine in the Year Book, 38 Edw. 3, that the right of action of two merchants survived, that the survivor should take the whole, and account to the administrator of the deceased, and that the administrator could not join; for Lord Holt said that it would make strange confusion, that one should sue in his own right, and the other in another's; and it has been undoubted law ever since that decision that the *remedy* survives.

Lord Eldon, in *Ex parte Ruffin*, 6 Ves. 126, says that in the law of merchants, the legal title in some respects, in all the equitable title, remains, notwithstanding the survivorship; and the same doctrine was acted upon in the Court of King's Bench, in the case of *Rex v. The Collector of the Customs at Liverpool*, 2 M. & S. 223, which case proceeded entirely on the ground that the legal title did not survive in the case of a partnership in ships.

On the other hand, the authority is very slender, that the title survives at law, and that the executor of the deceased person can only claim in equity. The most direct is a note of Lord Tenterden's, in his Treatise on Shipping, (p. 97,) in which it is said, the rule "*Jus accrescendi inter mercatores locum non habet*," is only enforceable in a Court of Equity, — but there is no prior authority quoted for that position. Mr. Justice Story (p. 68, American edition of Abbott) says that this note was not written by Lord Tenterden, but that seems not to be the case from a note of my brother Shee, (p. 97, c. 3, 7th ed.)

This note may have been founded on the authority of the doctrine in some equity reports where a Court of Equity has granted relief on survivorship. For instance, in *Lake v. Gibson*, 1 Ab. Ca. Eq. 291, the Master of the Rolls, Sir Joseph Jekyll, says, in all cases of a joint undertaking, either in trade or any other dealing, the joint owners are to be considered as tenants in common, and the survivors as trustees for those who are dead: but this observation follows a statement respecting a joint purchase of land, where the difference is pointed out between purchasing in equal shares, where there is a survivorship, and where the portions are not equal where there is none, in equity, however, the legal estate may survive at law. The latter indicates that the joint tenants do not mean to have an equal chance of survivorship, but that one shall hold in trust for the other in proportion to his share. There is no dictum that there is a survivorship at law, in all cases, between merchants. A similar doctrine to that in *Lake v. Gibson* has been laid down before in *Jeffereys v. Small*, 1 Vern. 217, A. D. 1683, by Lord Keeper Guildford, who is evidently treating of equities only, and who states the rule of equity to be, that if two persons are joint tenants by gift or devise, there is a survivorship; the parties are liable to all the consequences of the law; — but as to any joint un-

dertaking in the way of trade or the like, it was otherwise, and he decreed that the plaintiff should be relieved.

The *dicta* of judges in some subsequent cases were cited, which admit of the same explanation.

Lord Eldon, indeed, in *Crawshaw v. Collins*, 15 Ves. 227, speaking of partnership, says it determines "by the death of one partner, in which case the law says that the property survives to the others. It survives as to the legal title in *many* cases; but not as to the beneficial interest." Now, if Lord Eldon is speaking of choses in action, it is perfectly correct, and it is by no means clear that he meant any thing more.

Upon the whole, there is no satisfactory authority for the position that the title to partnership chattels survives at law, and the authorities the other way greatly predominate. It may be added that Mr. Justice Story on Partnership, sect. 342, treats it as the universally acknowledged rule, that upon the dissolution of the partnership by death, the property and effects thereof do not belong exclusively to the survivors, but they are to be distributed between them and the representatives of the deceased, in the same manner as they would have been upon a voluntary dissolution *inter vivos*. We consider, therefore, that the first point made on the part of the plaintiffs ought to be decided against them.

The next question is, whether the same law which excepts the goods of *merchants*, for the benefit of commerce, from the general law of joint tenancy, extends to those of *manufacturers*. At a very early period the term "merchant" was very liberally construed—it was held to include shopkeepers. 2 Brownl. 99. The same principle of the encouragement of trade applies to manufacturers, in partnership and every other description of trade. Story, sect. 342. It is then said that it does not extend to fixtures. But trade fixtures, which are removable, are part of the stock in trade, and clearly fall within the rule as to partnership stock, and all these fixtures were of that character. Therefore we are of opinion that one third of the fixtures seized belongs to the executors of William, and that they would be seizable under an execution by *fi. fa.* against his executor *de bonis testatoris*, if there were no other circumstances in the case.

But it was urged on behalf of the plaintiffs, that though the right to the chattels does not survive, the surviving partner or partners have of necessity a *jus disponendi*, for the purpose of winding up the partnership concerns, and that the conveyance by Abraham was within the scope of that authority, and transferred the legal title in all.

In the civil law such a *jus disponendi* prevails, in the case of both agents and partners of deceased persons. "Si vivo Titio, negotia ejus administrare cæpi: intermittere, mortuo eo non debeo: nova tamen inchoare necesse mihi non est: vetere explicare, ac conservare necessarium est: ut accidit, cum alter ex sociis mortuus est; nam quæcunque priori negotii explicandi causâ geruntur, nihilum refert, quo tempore consumuntur, sed quo tempore inchoarentur. Dig. lib. 3, tit. 5, l. 21, § 2.

In our law, this rule does not exist with respect to agents of de-

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ceased principals; and with respect to surviving partners, though there are expressions of text-writers, (Story on Partnership, sect. 344; 3 Kent's Com., Lect. 43, p. 63,) and judges, (*Harvey v. Crickett*, 5 Mau. & S. 336; see *Woodbridge v. Swann*, 4 B. & Ad. 636; *Beck v. Beck*, 3 Swanst. 627; Lord Nottingham's MS., and 1 Id. 507, note,) which have that aspect, there is no clear, satisfactory authority that the surviving partner has a power, by virtue of the partnership relation only, to transfer the legal title to the share belonging to the executors of the deceased, to a third person, leaving the executors to pursue their remedy against the survivor, if that authority is improperly exercised. It is clear that the legal title to the share of the survivor passes, and the purchaser therefore is at all events tenant in common with the executor; and as the law allows no right of action to one tenant in common against another, so long as the subject of the tenancy exists, and is capable of recaption, that circumstance will explain all the decisions on the subject, including *Harvey v. Crickett*, 5 Mau. & S. 336; see *Woodbridge v. Swann*, 4 B. & Ad. 633. In *Harvey v. Crickett*, the dicta of the judges go much further; probably Mr. Justice Bayley mistook the opinion of Lord Kenyon in *Smith v. Orrell*, 1 East, 368, and we doubt whether surviving partners have a power to sell, and give a good legal title to the share belonging to the executors of the deceased partner, when they sell in order to pay the debts of the deceased and of themselves; but, be that as it may, we think it clear, that the survivors could have no power to dispose of it otherwise than to pay such debts, certainly not to mortgage that share together with their own, (for that is the real nature of this transaction,) as a security for a debt principally due from the surviving partners, and in part only from the deceased, and in order to enable them to continue their trade. At all events, therefore, this transaction was not within the scope of any implied authority which the surviving partners may have, to wind up the affairs of the partnership; and therefore this conveyance did not pass the share of the deceased to the plaintiffs, by virtue of any implied authority in the survivors.

But then it was contended that Abraham Rhodes, who was executor *de son tort* to William, having himself joined in the conveyance of the entirety of the chattels to the plaintiffs, the legal property of William, the third passed to them. It was contended, that the defendant having treated Abraham as executor, by suing him as such, must be considered as treating him as lawful executor, and lawful executor for all purposes, and therefore could not dispute the transfer by him.

We think that this argument cannot prevail.

In the first place, the conveyance to the plaintiffs does not purport to convey more than the partnership interest in the fixtures, not the separate interest of Abraham Rhodes.

But admitting that Abraham Rhodes, by joining in the conveyance, and sanctioning thereby the transfer, on behalf of the surviving partner, of the entirety of the chattels, would, if he had been lawful executor, have been estopped from claiming the third of his testator against the plaintiffs, we do not think that the act of an executor *de*

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son tort can have the same effect. The act of an executor *de son tort* is good against the true representative of the deceased, only where it is lawful, and such an act as the true representative was bound to perform, in the due course of administration. *Greysbrooke v. Foze*, Plowd. 282. But this pledge constructively of the assets of William for, in part, the debt of his surviving partners, was one which the rightful executor was not bound to perform, and was not made in a due course of administration, and therefore was not good, when done by an executor *de son tort*, as against the true executor; that is, the chattels so disposed of did not cease to be part of the estate of the deceased, and therefore could be lawfully seized under an execution against the goods and chattels of the deceased; and as to the argument that, by suing Abraham as executor, the defendant admitted him to be altogether a rightful executor, that is not correct, for he might notwithstanding insist, in the course of it, that he was executor *de son tort* — for instance, if he had tried to retain under a plea of *plene administravit* for his own debt.

Therefore our judgment must be that the rule must be made absolute. Whether the defendant will ultimately obtain more than the interest of the deceased after taking the partnership account, is a point we are not to determine. — *Rule absolute.*

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Hilary Term, January 23, 1850.

County Court Act, 13 & 14 Vict. c. 61 — Costs.

A Judge's order for allowing costs to a plaintiff under the County Court Extension Act, 13 & 14 Vict. c. 61, may be made on a statement of the facts necessary to bring the case within the statute, without affidavit, if that statement is not disputed by the opposite party.

MACNAMARA moved to set aside an order made at chambers by Platt, B., for the payment of the plaintiff's costs, under the act extending the jurisdiction of the County Courts, 13 & 14 Vict. c. 61, s. 13. The affidavits on which the present application was founded stated that the plaintiff had recovered for a less sum than 20*l.*; that when the parties were before the Judge at chambers, no affidavit was produced by the plaintiff; and that it was not made to appear, by affidavit or otherwise, that the cause was one of those in which a concurrent jurisdiction is given to the Superior Courts by the 9 & 10 Vict. c. 95, or for which no plaint could have been entered in any County Court, or that the cause was removed from a County Court by *certiorari*. The 11th section of the 13 & 14 Vict. c. 61, enacts, "That if, in any action commenced after the passing of this act in any of her Majesty's Superior Courts of Record, in covenant, debt, detinue, or assumpsit, not being an action for breach of promise of marriage, the

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plaintiff shall recover a sum not exceeding 20*l.*; or if, in any action commenced after the passing of this act, in any of any of her Majesty's Superior Courts of Record, in trespass, trover, or case, not being an action for malicious prosecution, or for libel, or for slander, or for criminal conversation, or for seduction, the plaintiff shall recover a sum not exceeding 5*l.*, the plaintiff shall have judgment to recover such sum only, and no costs, except in the cases hereinafter provided, and except in the case of a judgment by default; and it shall not be necessary to enter any suggestion on the record to deprive such plaintiff of costs, nor shall any such plaintiff be entitled to costs by reason of any privilege as attorney or officer of such Court or otherwise." And by the 13th section it is enacted, "If, in any such action, whether there be a verdict in such action or not, the plaintiff shall make it appear, to the satisfaction of the Court in which such action was brought, or to the satisfaction of a Judge at chambers upon summons, that the said action was brought for a cause in which concurrent jurisdiction is given to the Superior Courts by the 128th section of the said recited act of the tenth year of her Majesty, or for which no plaint could have been entered in any such County Court, or that the said cause was removed from a County Court by *certiorari*, then and in any of such cases the Court in which the said action is brought, or the said Judge at chambers, may thereupon, by rule or order, direct that the plaintiff shall recover his costs, and thereupon the plaintiff shall have the same judgment to recover his costs that he would have had if this act had not been passed." Under the former County Court Act, 9 & 10 Vict. c. 95, the *onus* lay on the defendant to relieve himself from costs; the present act shifts the *onus* to the plaintiff to show himself entitled to them in certain excepted cases. The plaintiff now ought, therefore, to satisfy the Court or Judge of his right to costs, in the same manner as the defendant formerly made out his right to a suggestion, namely, by *affidavit* showing that his case comes within the statute. [*Platt, B.* — When the parties were before me, the facts stated by the plaintiff's attorney were not denied by the other side.]

POLLOCK, C. B. The regular course is this. If the attorney of a party summoned means to dispute the facts alleged, he should say to his antagonist, "Make an affidavit of them, and I will answer it." If he does not take this course, the facts must be taken as admitted. We must presume that the plaintiff did make out his case to the satisfaction of the Judge, unless you show the reverse.

PARKE, B. It would add greatly to the expense of proceedings at chambers, if we were to lay it down that there must be an affidavit in every case, whether the statements made by the party applying for an order are controverted or not.

ALDERSON and PLATT, BB., concurring — *Rule refused.*

Parker v. The Great Western Railway Company.

PARKER v. THE GREAT WESTERN RAILWAY COMPANY.¹

Hilary Term, January 29, 1851.

County Court — 9 & 10 Vict. c. 95 — 13 & 14 Vict. c. 61 — *Certiorari* — *Carrier*.

Semble, per curiam, that the jurisdiction given to the Superior Court by the 9 & 10 Vict. c. 95, s. 90, to remove a cause from a County Court, by *certiorari*, is not taken away by the 13 & 14 Vict. c. 61, s. 16; but it was

Held, that on applying for a *certiorari* under that statute, all material facts relative to the state of the cause in the Court below should be brought before the Judge in order to enable him to exercise his discretion in granting or refusing the writ.

Quere, per Martin, B., whether the action for money had and received was maintainable under the circumstances in *Parker v. The Great Western Railway Company*, 7 Man. & G. 253; 8 Jur. 194.

THIS action was commenced by plaint in the County Court of Bristol, on the 31st October, 1850, and was brought against the defendants as common carriers, to recover a sum of 50*l.* for an alleged overcharge in the carriage of goods. The cause came on to be heard on the 19th November, and having occupied seven days in the hearing, was adjourned till the 23d January. On the 20th of that month the defendants made an *ex parte* application to a Judge at chambers for a *certiorari* to remove the cause into this Court, on the ground that it involved a question of a right to toll, and consequently that the County Court had no jurisdiction by the 9 & 10 Vict. c. 95, s. 58; and also that it raised a difficult point of law, namely, the right of the company to charge separately for the various parcels carried by them.

C. Pollock, on a former day in this term, moved to quash the *certiorari*. First, it is a question whether the power to remove causes from the County Court by *certiorari*, given by the County Court Act, 9 & 10 Vict. c. 96, s. 90, is not altogether taken away by the recent County Court Act, 13 & 14 Vict. c. 61. By the former it is enacted that "No plaint entered in any Court holden under this act shall be removed or removable from the said Court into any of her Majesty's Superior Courts of Record, by any writ or process, unless the debt or damage claimed shall exceed 5*l.*, and then only by leave of a Judge of one of the said Superior Courts, in cases which shall appear to the Judge fit to be tried in one of the Superior Courts, and upon such terms as to payment of costs, giving security for debt or costs, or such other terms as he shall think fit." Now the second act, after extending the jurisdiction of the County Courts to 50*l.*, with an appeal to two *puisne* Judges of any of the Superior Courts when the amount claimed exceeds 20*l.*, enacts in its 16th section that, "No judgment, order, or determination given or made by any Judge of a County Court, nor any cause or matter brought before him or pending in his Court, shall be removed by appeal, motion, writ of error, *certiorari*, or otherwise, into any other Court whatsoever, except in the manner and

¹ 15 Jur. 109.

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according to the provisions hereinbefore mentioned." The Court of Queen's Bench has in another case granted a rule in order to have this point determined. [Parke, B. — Is it then contended that a *certiorari* may issue when the amount in dispute is the smaller sum where there is no appeal, and not in case of the larger sum because there is one? Pollock, C. B. — That is so absurd a consequence, that we should not adopt it without consideration.] Secondly; at all events, all the material facts in the case, including the state of the cause and the amount of expense incurred by the seven days' hearing, ought to have been brought before the Judge at chambers, in order to enable him to exercise his discretion on the matter. Thirdly; on the point of law sought to be raised by the defendants, the cases of *Parker v. The Great Western Railway Company*, 7 Man. & G. 253; 8 Jur. 194, and *Pickford v. The Grand Junction Railway Company*, 10 M. & W. 399; s. c. 10 Law J. Rep. (N. S.) Exch. 342, are authorities against them.

The Court granted a rule; against which

Kinglake, Serj., now showed cause, and contended that the *certiorari* was not taken away; and that, on the true construction of the statute regulating the defendant company, a demand for the carriage of goods under circumstances like the present, amounted to a toll. On the first of these points he referred to the 2d section of the 13 & 14 Vict. c. 61, and *Jones v. Holdsworth*, 16 Law Times, 325.

Lush, in support of the rule, argued that no claim to toll within the meaning of the 9 & 10 Vict. c. 95, s. 58, was in dispute, but if there even were, the remedy should be by prohibition, not *certiorari*.

POLLOCK, C. B. This rule must be made absolute: not however on the ground that the *certiorari* is taken away by the recent statute, respecting which I entertain no doubt that it is not. The ground on which this rule ought to be absolute is, that it was necessary to state to the Judge on the affidavits the real state of the cause, in order that he might impose on the parties such terms as might seem fit in his discretion, whereas this writ was obtained on a representation which concealed from the Judge the true facts, and so prevented him exercising his discretion.

PARKE, B. I am of the same opinion. I have not the least doubt, and this is not the first time that I have had to consider the question,¹ that the *certiorari* is not taken away in cases like the present. The words of the 16th section of the recent act are, that it shall be taken away in all cases "save and except in the manner and according to the provisions hereinbefore mentioned." Then look at the provisions before mentioned. One is in the 2d section, that this act and the act 9 & 10 Vict. c. 95, "shall be read and construed as one act, as if the

¹ The Court had intimated a similar opinion a few days previous, on a motion to quash a *certiorari*; and see the next case.

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several provisions in the said recited act contained, not inconsistent with the provisions of this act, were repeated and reenacted in this act." The provision of the former act, allowing a *certiorari*, is by no means inconsistent with the right of appeal given by this act—they may both well stand together—and therefore the present statute is to be read as if that clause was in it. This appears to me to be perfectly clear, although it will not be necessary to pronounce a binding opinion on the point; for this rule must be absolute on another ground, namely, that in bringing the case before the Judge, the defendants did not show him the facts so as to enable him to impose the proper conditions. If they had disclosed all the facts, the Judge would not have given an absolute writ, but qualified it with terms. It will not be necessary to say whether the Judge properly exercised his power in removing the cause; it may possibly be that as there is no doubt about the jurisdiction—for certainly no question of toll was involved—the removal, was discretionary with the Judge, if all the facts had been brought before him. There is no difficult point of law in this case,—*Parker v. The Great Western Railway Company*, and *Pickford v. The Grand Junction Railway Company*, seem authorities on that,—but a mere matter of detail which would probably be better investigated before the Judge of a County Court, than by a Judge and jury.

ALDERSON, B., concurred.

MARTIN, B. If the point should arise which came before the Court of Common Pleas in *Parker v. The Great Western Railway Company*, as to whether an action for money had and received could be maintained under such circumstances, I should like to see it brought to a Court of Error.

ALDERSON, B. Two *puisne* Judges, sitting as a Court of Appeal, would never overrule a decision of the Court of Common Pleas on the point referred to by my brother Martin. — *Rule absolute*.

MUNGEAM v. WHEATLEY.¹

Hilary Term, January 25 and 30, 1851.

County Court — 9 & 10 Vict. c. 95, s. 121 — *Certiorari* — *Replevin*.

The conditions imposed by the 121st section of the County Court Act, 9 & 10 Vict. c. 95, on removing suits in replevin from those Courts by *certiorari*, are to be complied with when the writ is delivered to the Judge in Court.

A Judge to whom such a writ was delivered refused to allow it, and proceeded to try the cause, on the ground that notice of the sureties was not given to the clerk of the Court in sufficient time to communicate with the Judge in order to enable him to fix the amount of

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the security, and the clerk to express his approval of the sufficiency of the sureties before the sitting of the Court at which they were to be taken : —

Add erroneous, as the question of the sufficiency of the sureties could not arise until the Judge had received in Court the declaration required by that section, and fixed the amount in which the sureties were to be bound.

Quere, if after such declaration and fixing such amount time be required to examine into the sufficiency of the sureties, the Judge may adjourn the cause for that purpose.

Every *certiorari* issued under this section ought to be made returnable so as to allow a sufficient time for the preliminary inquiries which it directs.

The declaration required by that section may be made by the attorney of the party, at least if he is himself unable to attend ; and, in receiving that declaration, the duty of the Judge is altogether ministerial.

Where the Judge of a County Court, even through mistake of the law, disobeys a *certiorari* under this section, the remedy is by attachment, or perhaps by rule to return the writ.

PEACOCK, in Michaelmas term, obtained a rule for an attachment against the Judge of the County Court of Kent, holden at Gravesend, for contempt in refusing to receive and return a writ of *certiorari* issued out of this Court, to remove a plaint in a cause of *Mungeam v. Wheatley*. The suit was in replevin for making an illegal distress for rent, and was commenced on the 4th October, 1850. On the 4th November a writ of *certiorari* to remove it into this Court was issued, returnable on the 8th, the day on which the cause stood for hearing in the Court below. At the sitting of the Court on that day, the defendant's attorney delivered the writ of *certiorari* to the Judge, and offered to make the declaration required by the 121st section of the County Court Act, 9 & 10 Vict. c. 95, namely, that the rent in respect of which the distress was taken, exceeded 20*l.*, and in fact amounted to 60*l.*, or, after deducting the land tax, to 50*l.* 5*s.* 3*d.* He also produced the bond required by that section, and stated that the sureties therein named were present and ready to execute it. The declaration was likewise made by a person of the name of Watkins, a medical man, who deposed on oath that the defendant was incapacitated by illness from attending in the Court, and had executed to him a power of attorney to act in his stead. That instrument, after reciting the action and desire of the defendant, L. L. Wheatley, to have it removed by *certiorari*, proceeded thus : "The said L. L. Wheatley doth by these presents nominate, constitute, and appoint A. Watkins, &c., his true and lawful attorney, and in his name, and as his act, to sign, seal, and deliver any bond which the Judge of the said County Court may require to be given by him, the said L. L. Wheatley, to prosecute the said suit when removed before the Barons of the Court of Exchequer as aforesaid, with effect and without delay, and to prove before the said Court of Exchequer, that there was ground for believing that the damage sought to be recovered by the said action is more than 20*l.* or otherwise, and generally to take and adopt all and every such proceedings and proceeding, and do and perform all and every such acts and act, deeds and deed, in and about the conduct, management, prosecution, suspension, or determination of the said writ or otherwise in relation thereunto, as he, the said A. Watkins, shall think proper, as fully and effectually, to all intents and purposes, as the said

L. L. Wheatley might or could do if personally present." The Judge, however, refused to allow the writ, assigning as his reasons that the declaration must be made by the defendant in person or by writing verified: and also that notice of the sureties ought to have been given in sufficient time to enable the clerk of the Court to communicate with the Judge, in order to enable him to fix the amount of the security, and the clerk to express his approval of the sufficiency of the sureties before the sitting of the Court at which they were to be taken. The cause was therefore tried, and the jury having found a verdict for the plaintiff, with 50*l.* damages, judgment was given accordingly, and an order made for the payment of that sum with costs.

Sir F. Thesiger, Bodkin, and Horn showed cause. There is no ground for an attachment, as the Judge has not been guilty of any wilful disobedience to the writ. If he did wrong in trying the cause under the circumstances, the proper remedy would be by prohibition. [*Parke, B.* — An attachment does not always imply wilful contempt. An attachment against a sheriff, for instance, does not suppose moral misconduct.] Besides, as the Judge did receive the writ, he ought to have been ruled to return it. *Rex v. Battams*, 1 East, 298; *Paley, Conv.* 294. [*Pollock, C. B.* — I do not know that a rule to return a writ is necessary, when there has been an actual disobedience to it.] But it may well be doubted whether the Judge has committed any mistake at all in his construction of the statute. The position that the delivery of a *certiorari* to an inferior tribunal at once suspends its functions, is only true of a *certiorari* at common law; it is otherwise where, as in the present case, conditions precedent to the action of the writ are imposed by statute; if those conditions are not complied with, the Judge ought to disallow the writ. In 2 Hale's P. C. 213, we find it said, "If a *certiorari* issue and ought to be allowed, the proceeding of the Justices after is *coram non iudice*." In 2 Hawk. P. C., c. 27, s. 67, "Inferior Courts, proceeding after a *certiorari* delivered where by law they ought not, are punishable for a contempt." [They also cited on this point, *Cro. Eliz.* 916; 1 Burn's Just. 553; 1 Chitt. Crim. Law, 392; and *Grad. & Sc. Q. B. Prac.* 174.] Thus, it is enacted by the 21 Jac. 1, c. 23, ss. 2, 4, that no *certiorari* shall be received, or allowed to remove a cause, unless delivered before issue or demurrer, and unless the demand amount to 5*l.* By the 5 Geo. 2, c. 19, s. 2, no *certiorari* shall be allowed to remove the orders of Justices without a recognizance to the amount of 50*l.*, with sureties, to prosecute with effect, and in case the party shall not enter into such recognizance, or shall not perform the above conditions, the Justices may proceed as if no *certiorari* had been granted: and that was acted on in *Rex v. Dunn*, 8 T. R. 217. So by the stat. 5 & 6 Will. 4, c. 33, defendants who remove indictments into the Queen's Bench by *certiorari*, shall, before allowance of the writ, enter into a recognizance in such sum and with such sureties as that Court or a Judge shall direct: and it is the common practice at the Central Criminal Court to treat as a nullity any *certiorari* presented without them. The 7 & 8 Geo. 4, c. 29, s. 63, having taken away the *certiorari*, in indictments for

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obtaining money under false pretences, the officer of an Inferior Court would rightly disregard a *certiorari* issued in such a case. [*Alderson, B.* — There the Judge sees by the statute that no *certiorari* at all can issue.] Now the language of the 121st section of the 9 & 10 Vict. c. 95, on which the present question depends, is, "In case either party to any action of replevin shall declare to the Court in which such action shall be brought, that the title to any corporeal or incorporeal hereditament, or to any toll, market, fair, or franchise is in question, or that the rent or damage in respect of which the distress shall have been taken is more than the sum of 20*l.*, and shall become bound with two sufficient securities, to be approved by the clerk of the Court, in such sums as to the Judge shall seem reasonable, regard being had to the nature of the claim, and the alleged value or amount of the property in dispute, or of the rent or damage, to prosecute the suit with effect and without delay, and to prove before the Court by which such suit shall be tried, that such title as aforesaid is in dispute between the parties, or that there was ground for believing that the said rent or damage was more than 20*l.*, then and not otherwise, the action may be removed before any Court competent to try the same, in such manner as hath been accustomed." The words that "then and not otherwise the action may be removed," show the intention of the legislature that the conditions specified must be strictly followed before the Judge of the County Court can allow the *certiorari*. It is by no means clear that he was wrong in requiring the personal attendance of the defendant to make the required declaration; and he was right in considering that the clerk of the Court ought to have had time to inquire into the sufficiency of the sureties.

On the Court observing that damages to the amount of 50*l.* was altogether unusual in actions of replevin, *Horn* said that he was counsel for the plaintiff at the trial, and had conducted the case as an action for illegal distress, which had probably misled the Judge.

C. Clark, (absente *Peacock*), in support of the rule. The power of the Judge of an Inferior Court to proceed with a cause is suspended absolutely by the delivery of a writ of *certiorari*. 1 Tidd's Prac. 404, 9th ed. *Cross v. Smith*, 1 Salk. 148-9. *Bevan v. Prothesk*, 2 Burr. 1151. Dy. 245 a, pl. 63. It would be absurd to require the personal attendance of parties to make the declaration required by this statute — a plaintiff or defendant might be in India, or be a corporation aggregate. [He was then stopped.]

PARKE, B. The Judge of the County Court has disobeyed the writ of *certiorari*. The question turns on the 121st section of the 9 & 10 Vict. c. 95, under which that *certiorari* was issued. We have already expressed our opinion that the matters required by that section as preliminary to the action of the *certiorari* are to be complied with after and before the issuing of the writ. When therefore the writ issues, it is to be obeyed *judicially*; like as in the case of *certioraris* to Inferior Courts under the 21 Jac. c. 23, and the 5 Geo. 2, c. 19; the latter of which are inoperative unless recognizances are entered into

pursuant to the statute. The effect of the *certiorari* here is conditional; it operates if what the statute requires to be done is done; as in the case which has been cited from 8 T. R. 217: so that I read the statute and the *certiorari* together, as if the latter were a direction to remove the plaint, provided the party declare to the Court that "the title to any corporeal or incorporeal hereditament, or to any toll, market, fair, or franchise is in question, or that the rent or damage in respect of which the distress shall have been taken is more than the sum of 20*l*." When that declaration is made, the Judge has a further duty to discharge before he allows the *certiorari*; namely, to fix the amount in which the sureties required by that section are to be bound, and the clerk of the Court is then to take the sureties: when all these things are done, then, and not till then, is the cause to be removed. That is the proper exposition of this 121st section. Then we are to inquire was the Judge right in the course he pursued in the present instance. Now certainly the statute is obscure, not merely as to the time and mode of complying with the conditions to which I have adverted, but obscure as to the manner in which the party shall make the required declaration. It is argued that the declaration for the removal of plaints in replevin from small debts Courts is to be made by the party to the suit, and cannot be made by any one else: and it is a question of some nicety. But considering the extreme inconvenience of holding that a landlord, defendant in replevin, must be at the trouble of coming to make such a declaration, no matter where he may reside, we think that according to the reasonable construction of the statute that declaration may be made by a person who conducts the suit, i. e. the attorney instead of the party. When it is made, the duty of the Judge is not then to return the writ, but to do the other things pointed out in the section. Hitherto his act is a ministerial act, for he is not to determine the truth of the declaration: if the party or his agent make one, the Judge is bound to go on by taking the proper steps consequent upon it. He ought immediately to fix the amount of the sum for which surety is to be taken, and should the sufficiency of the sureties be established to the satisfaction of the clerk of the County Court, then the party enters into a bond with those sureties to prosecute the suit; for the statute does not say they shall enter into a recognizance, but "shall become bound." The Judge, therefore, in the present case, did not do what it was his duty to do as Judge: and although it is but a mistake, I confess I do not know he could be set right, except by this motion for an attachment, or perhaps by a rule to return the writ. It is not necessary to say any thing about what took place afterwards, as he did not take the proper preliminary steps to carry out the statute; and certainly ought not to have tried the cause. Whether he was right in allowing so large a sum to be given for damages as 50*l*. is, therefore, beside the present question. He was quite wrong in so doing; but he may have been led into it by supposing that the action was for an excessive distress, though the form of the plaint shows it was a replevin. We however have only to inquire if the Judge has disobeyed our writ, and it appears that he has done so; not wilfully indeed —

we never supposed that — but he has made a mistake. The rule for an attachment must therefore be absolute: but as there was nothing but a mistake, the attachment shall lie in the office for a month, and in the mean time a fresh *certiorari* can be issued, which the Judge will take care to obey; for I have some doubt if the present one so long returnable could now be obeyed by making the preliminary inquiries. In order to give proper effect to this part of the statute, a *certiorari* issued under it should be made returnable in sufficient time to make those inquiries.

ALDERSON, B. It is clear that the Judge was wrong on the first two points, and until he decides right on them the other question does not arise at all. On receiving the *certiorari* he should have accepted the declaration of the attorney, that the rent in respect of which the distress was taken was more than 20*l*. That he has failed to do; having thought that that declaration should be made by the defendant in person, and that until then the trial could not be stayed. He was wrong there, and in my opinion he was also wrong in not fixing the amount of the sureties to be given by the party that the cause should be properly brought before the Superior Court. Until the Judge does the act of fixing the amount in which the sureties are to be bound, it is impossible for the party to tender them, or to do any thing. As the Judge did not do those two preliminary acts, all that he did afterwards was done under a mistake, and the writ has been disobeyed. It may be a question, on which I give no opinion, as to what ought to have been done, if after he permitted the declaration to be made, and fixed the amount of surety, the parties had been unable to comply with the other requisites of this section within a reasonable time. But that question does not arise here, for he has prevented them by not doing the preliminary acts. I quite agree that there is no ground for imputing wilful disobedience to our writ, and that the question was one on which the Judge might very reasonably entertain a doubt: we must, however, act on our construction of the statute. I agree also that the attachment should lie in the office for a month, and redress be granted by issuing a fresh *certiorari*, which will no doubt be obeyed.

MARTIN, B. It seems to me that this case is quite clear. The statute says distinctly that where the rent in respect of which the distress is taken shall exceed 20*l*., the plaint may be removed by *certiorari* on certain conditions: and instead of throwing difficulties in the way of parties, it is the duty of Judges to aid them. It would be better if these inferior Judges would confine themselves to cases where they have jurisdiction, and where they have not, to carry out the rights of the parties. It is no disrespect to a Judge to remove a cause which a party has a right to remove. The Judge in this case meant nothing wrong: but it was his duty to have suspended all proceedings, on receiving the declaration of the attorney, to have fixed the amount of surety, and given the party every reasonable aid.

The North-western Railway Company v. M'Michael.

The LORD CHIEF BARON did not make any observation.

C. Clark applied for costs; but

The COURT refused to grant them. — *Rule absolute accordingly.*

THE NORTH-WESTERN RAILWAY COMPANY v. M'MICHAEL. THE
BIRKENHEAD, LANCASHIRE, AND CHESHIRE JUNCTION RAILWAY
COMPANY v. PILCHER.¹

Hilary Term, January 11, 1861.

Railway Company — Infancy — Shareholder.

In an action under the Companies Clauses Consolidation Act, 8 Vict. c. 16, s. 26, for calls on shares in a railway company, which the defendant has obtained by original agreement with the company, and his name entered in their register of shares as proprietor thereof; it is no answer to plead that the defendant was an infant at the time of the agreement for the shares, and of entering his name on the register, and of making the calls, that he never ratified or confirmed the purchase, and that the bargain was a disadvantageous one to him.

THE NORTH-WESTERN RAILWAY COMPANY v. M'MICHAEL.

THIS was an action of debt for calls in the Northwestern Railway Company, the declaration being in the statutable form prescribed by the Companies Clauses Consolidation Act, 8 Vict. c. 16, s. 26, with a count for interest. To the first count the defendant pleaded that "before the making of any of the calls in the declaration mentioned, to wit, on the 2d day of November, 1846, the defendant applied to the said company, the plaintiffs in this suit, to become the holder of ten shares in the said company; and the said company then, to wit, on the day and year aforesaid, in pursuance of the defendant's said application, granted the shares in the declaration mentioned to him as the original and first holder thereof, and then entered his name in the register of shareholders in the said company as the proprietor of the said shares: and so the defendant then became and still is the original and first holder of the shares in the declaration mentioned, by contract with the said company, to wit, in the manner aforesaid, and not otherwise: and the proprietorship of the said shares acquired as in this plea aforesaid, is the same proprietorship of the said shares in the declaration mentioned. And the defendant further says, that when he applied as aforesaid, and when the shares in the declaration mentioned were granted to him, and his name entered as aforesaid, and also at the respective times of the making of the calls in the first count mentioned, he the defendant was an infant within the age of

¹ 15 Jur. 132.

The Birkenhead, Lancashire, & Cheshire Junction Railway Company v. Pilcher.

twenty-one years, to wit, of the age of twenty years. And the defendant further says that he has never ratified or confirmed the said application, grant, entry, and proprietorship, or any or either of them, but the same have and each and every of them hath hitherto always remained wholly unratified and unconfirmed. And the defendant further says, that he has not at any time derived any profit, benefit, or advantage whatsoever from the said shares or by reason of his being proprietor thereof, and such proprietorship has always been wholly unprofitable and useless to the defendant:" concluding with a verification. There was an analogous plea to the count for interest: and the plaintiffs demurred generally to both pleas.

The case was argued at the Sittings in Banc, after Michaelmas term, by

Willes, for the plaintiffs, and

Cleasby, for the defendant.

The 8 Vict. c. 16, ss. 14-20, 79, was referred to, with the following authorities: *The Leeds and Thirsk Railway Company v. Fearnley*, 4 Exch. 26; s. c. 18 Law J. Rep. (N. S.) Exch. 330; *The Newry and Enniskillen Railway Company v. Coombe*, 3 Exch. 565; s. c. 18 Law J. Rep. (N. S.) Exch. 325; *The Cork and Bandon Railway Company v. Cazenove*, 10 Q. B. 935; 11 Jur. 802; Co. Litt. 2 b.; *Ketley's or Ketsey's Case*, Brownl. 120; Cro. Jac. 320; reported 2 Bulst., nom. *Kirton v. Elliott*, and in 1 Roll. Ab. 731, nom. *Kettle v. Eliot*; Bac. Ab., "Infancy and Age," G. and L. 7 and 8; *Humble v. Mitchell*, 11 Ad. & El. 205; 3 Jur. 1188; *Williams v. Moor*, 11 M. & W. 256; s. c. 12 Law J. Rep. (N. S.) Exch. 253; *The Earl of Buckinghamshire v. Drury*, Wilmot's Opinions, 194; *Maddon v. White*, 2 T. R. 159; *Baylis v. Dineley*, 3 Mau. & S. 481; *Gibbs v. Merrill*, 3 Taunt. 307; *Holmes v. Blogg*, 2 B. Moo. 552; *Bligh v. Brent*, 2 Y. & C. Exch. R. 268; and *Townson v. Tickell*, 3 B. & Al. 31. — *Cur. adv. vult.*

THE BIRKENHEAD, LANCASHIRE, AND CHESHIRE JUNCTION RAILWAY COMPANY v. PILCHER.

THIS was an action for a call, with the declaration in the same statutable form. The defendant pleaded that "at the time when he the defendant first became and was the holder of the said shares in the declaration mentioned, and at the time of making and entering into by him the defendant of the contracts by the force, virtue, and in pursuance of which the debts, causes of action, and liabilities, and each and every of them, in the declaration mentioned accrued to the plaintiffs and been incurred by the defendant as in the declaration alleged, and at the time of the making and entering into by him the defendant of the contracts by the force, virtue, and in pursuance of

The Birkenhead, Lancashire, & Cheshire Junction Railway Company v. Fletcher.

which the plaintiffs claim to be entitled by law to make the said call upon the defendant, and to demand and have the amount of the same of and from the defendant in manner and form as in the declaration is alleged, he the defendant was an infant under the age of twenty-one years, to wit, of the age of nineteen years:" concluding with a verification. A verdict having been found for the defendant on a traverse of the infancy; a rule was obtained to enter judgment for the plaintiffs *non obstante veredicto*, on the ground that the plea disclosed no answer to the action. When this rule came on for argument at the Sittings in Banc, after Michaelmas term,

Welsby appeared to show cause, and

Willes in support of it.

The Court, however, said that it was needless to argue the case, the point being the same with that in *The North-western Railway Company v. M'Michael*, then standing for judgment. To this both counsel assented. — *Cur. adv. vult.*

The judgment of the Court, consisting of Parke, Alderson, and Platt, BB., was now delivered in both cases, as follows:—

PARKE, B. The question to be decided in the first of these cases is, whether the first plea (that to the second count being identical) contains a good *prima facie* answer to the declaration.

If the effect of a person actually becoming a shareholder in a railroad company, by an original agreement with the company, ought to be treated as a mere contract with those to whom the proposal was made, for a future partnership with the persons who should be afterwards fixed upon by them, and to contribute to the capital for carrying on the undertaking, in a certain proportion, such a contract could not be presumably beneficial to an infant, and would be, as all mere contracts except for necessities are, not binding on the infant at all; and the simple fact, that the defendant at the time he made the contract was an infant, would be an answer to an action upon it. The same may be said of an executed contract for the purchase of a mere personal chattel.

But in the cases already decided upon this subject, infants having become shareholders in railroad companies have been held liable to pay calls made whilst they were infants. *The Cork and Bandon Railway Company v. Cazenove*, 11 Jur. 802; 10 Q. B. 935. *The Leeds and Thirsk Railway Company v. Fearnley*, 4 Exch. 26; s. c. 18 Law J. Rep. (N. S.) Exch. 330. They have been treated therefore as persons in a different situation from mere contractors, for then they would have been exempt; but in truth they are purchasers, who have acquired an interest not in a mere chattel, but in a subject of a permanent nature, either by contract with the company, or purchase, or devolution from those who have so contracted, and with certain obligations attached to it, which they were bound to dis-

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charge, and have been thereby placed in a situation analogous to an infant purchaser of real estate, who has taken possession, and thereby become liable to all the obligations attached to the estate; for instance, to pay rent, 21 Hen. 6, 31 B, in the case of a lease rendering rent, and to pay a fine due on an admission, in the case of a copyhold, to which an infant has been admitted, *Evelyn v. Chichester*, 3 Burr. 1717; unless they have elected to waive or disagree to the purchase altogether, either during infancy or after full age, at either of which times it is competent for an infant to do so. Bac. Ab., "Infancy and Age," I 5; Co. Litt. 380, a. This Court accordingly held, in *The Newry and Enniskillen Railway Company v. Combe*, 3 Exch. 565; s. c. 18 Law J. Rep. (N. S.) Exch. 325, that an infant who did avoid the contract of purchase during minority was not liable to pay any calls. In the subsequent case of *The Leeds and Thirsk Railway Company v. Fearnley*, 4 Exch. 26, where there had been no waiver or repudiation of the purchase, we held, in conformity with the decision in the Queen's Bench, that the defendant continued liable.

We cannot say that we concur in the opinion of that Court as reported in 11 Jur. 802, and 10 Q. B. 935, if it goes to the full extent that *all* shareholders, including infants, are, by the operation of the railroad acts, made absolutely liable to pay calls. No doubt the stat. 8 Vict. c. 16, not only gave a more easy remedy for calls against the holder of shares, by original contract with the company, and also attached the liability to pay calls to the shares, so as to bind all subsequent holders; but we consider, as we have before said, that there are implied exceptions in favor of infants, lunatics, &c., in statutes containing general words, *Stowell v. Lord Zouche*, Plowd. 364, depending of course on the intent of the legislature in each case; see *Wilmot's Opinions*, 194, *Earl of Buckinghamshire v. Drury*; and that this statute did not mean by general words to deprive infants of the protection which the laws gave them against improvident bargains. Under this statute, therefore, our opinion is, that an infant is not absolutely bound, but is in the same situation as an infant acquiring real estate, or any other permanent interest; he is not deprived of the right which the law gives all infants, of waiving and disagreeing to a purchase which he has made, and if he waives it, the estate acquired by the purchase is at an end, and with it his liability to pay calls, though the avoidance may not have taken place till the call was due. See Bac. Ab. "Infancy and Age," I 8. The law is clearly laid down in Co. Litt. 2, b.: "An infant or minor hath, without consent of any other, capacity to purchase, for it is intended for his benefit, and at his full age he may either agree thereunto, and perfect it, or, without any cause to be alleged, waive or disagree to the purchase; and so may his heirs after him, if he agreed not thereunto after his full age." A shareholder, indeed, in a railway company, or other chartered corporation, is not thereby made a holder of real estate, *Bligh v. Brent*, 2 Y. & C. Exch. R. 268—for all real estates are vested in the corporate body, not in the individuals comprising it—but the shareholder acquires, on being registered, a vested

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interest of a permanent character in all the profits arising from the land and other effects of the company, and when registered may be deemed a purchaser in possession of such interest, and is placed in a position analogous to that of a purchaser in possession of real estate.

When, therefore, there is nothing but the simple fact of infancy pleaded to an action for calls against a purchaser, who has been registered, and thereby become a shareholder in a subject of a permanent nature, the interest continuing to be vested in the infant, and the consequent obligation to pay, the simple plea of infancy is, according to the above authorities, insufficient; and on that ground, we think the plea in the case of *The Birkenhead Railway Company v. Pilcher*, which we have to consider with this, bad, notwithstanding the verdict; and, therefore, are of opinion that in that case the rule should be absolute to enter judgment for the plaintiffs.

But the case of *The North-western Railway Company v. Mr Michael* contains, besides the averment of infancy at the time of the contract for the shares, other special facts not a waiver by the infant, but averments that he had derived no advantage from the shares, and had never ratified or confirmed the purchase.

This case is one of more difficulty. The law upon this subject is to be found as early as 21 Hen. 6, 81 B.; where it was held by Newton, C. J., that if an infant lessee keeps the land, he is bound to pay the rent; and in conformity with that ruling was the decision in a case reported in Brownl. 120, as *Ketley's Case*; Cro. Jac. 320, as *Ketsey's Case*; 2 Bulst. 69, as *Kirton v. Elliott*; and in 1 Roll. Ab. 731, as *Kettle v. Eliot*. The case is most fully reported in Brownlow. It was an action of debt for rent. The defendant pleaded his infancy at the time of the lease made in bar; and it was held on demurrer to the plea, that the defendant should be charged, because by the lease made he is become a purchaser, and so to be in judgment of law as a man of full age.

We collect that the principle upon which the Court decided was, that every purchase being presumably for the benefit of the infant, his purchase vested the estate in him on entry and taking possession, and rendered him liable to the obligation attached to it, until he disagreed to the estate, and thereby caused the conveyance to be inoperative, and avoided the obligation to pay rent. In referring to this case the passage in Bac. Ab., "Infancy and Age," I. 8, treats the infant as being bound by reason of acquiescence after full age—how that could be collected from the reports of the case is not clear—and so Lord Ellenborough, in *Baylis v. Dineley*, 2 Mau. & S. 481, intimates an opinion, that leases are equivocal whether for the benefit of the infant or not, and that if he continues a possessor after age, he adopts it; and this was a part of the argument for the defendant at the bar. But it seems to us to be the sounder principle, that as the estate vests, as it certainly does, the burthen upon it must continue to be obligatory, until a waiver or disagreement by the infant takes place; which, if made after full age, avoids the estate altogether, and reverts it in the party from whom the infant purchased; if made

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within age, suspends it only, because such disagreement may be again recalled when the infant attains his majority.

But then arises a question of difficulty — whether the fact that this particular purchase was a disadvantageous one is an answer, the estate being vested in the infant.

We are disposed to think that the plea does not sufficiently state that the contract was a losing one, or that the shares were not worth what the defendant agreed to pay, which they well might be, though defendant himself had actually made no profit by them; but supposing the averment to be sufficient in that respect, we still think the plea bad.

This question appears to have been discussed in the case of *Kelley*, as reported in *Bulstrode*: Haughton, J., expressing an opinion that if the lease was of an acre at 100*l.* rent by the year, and the infant occupy and enjoy it, he is to be charged with the rent, he being there taken to be a purchaser: but Dodderidge, J., said that if a greater rent were reserved than the land was worth, there *peradventure* the infant should not be charged. And the same opinion is more strongly expressed in the report in *Brownlow*.

This is certainly a point of some nicety. But the question may be asked, why in such a case does not the infant disagree to and avoid the purchase, and so get rid of the obligation, and is it reasonable that he should retain the estate and prevent the owner having any use of it, and not be liable to the burthen though disproportionate?

It may be answered, that whilst he is an infant he is incompetent to decide whether he ought to waive the purchase or not, and in the mean time he ought to be at liberty, or his guardian for him, to get rid of the liability by showing that it was a prejudicial contract. But if so, such a plea would not be good if the infant had attained his majority — for then clearly he ought to disclaim it, and thereby give back the estate — and to make such a plea good where there is no disclaimer averred, it ought to appear that the infant is not yet of age. The point, whether this plea as it stands is good, is by no means free from doubt. We think, however, the more reasonable view of the case is, that the infant, even in the case of a lease which is disadvantageous to him, cannot protect himself if he has taken possession and has not disclaimed — at all events unless he still be a minor. We think that the defendant is in a situation analogous to that, unless he disclaims the interest, and so avoids the transaction altogether. He cannot keep the interest, and prevent the company from having it and dealing with it as their own, without being liable to bear the burthen attached to it.

For these reasons we think the plea in this case is also bad; and our judgment must be for the plaintiffs. — *Judgment for the plaintiffs in the first case; rule absolute in the second.*

Copeman v. Gladden.

COPEMAN v. GLADDEN.¹

Hilary Term, January 29, 1851.

County Court — 9 & 10 Vict. c. 95 — 1 & 2 Vict. c. 110, s. 22.

The judgment of a County Court may be removed into a Superior Court under the 1 & 2 Vict. c. 110, s. 22, although the party against whom it has been obtained has already been examined by the Judge of the County Court, and committed to jail under the 9 & 10 Vict. c. 95, s. 99.

HODGES had obtained a rule under the 1 & 2 Vict. c. 110, s. 22, to remove into this Court a judgment obtained in a County Court. The proceedings were commenced by plaint in the usual way, and judgment recovered for 49*l.* 7*s.* 6*d.* with costs: subsequent to which the Judge of that Court examined the defendant and heard evidence under the County Court Act, 9 & 10 Vict. c. 95, s. 99, respecting a fraudulent transfer of his property made by the defendant with a view to defraud his creditors: and being satisfied that such fraudulent transfer had been made, committed the defendant to jail for forty days, which period had expired at the time when this rule was granted. It was sworn that the defendant had no goods or chattels, and that unless charged in execution on a *ca. sa.* from this Court, all remedy on the judgment would be lost, and the necessary steps could not be taken to make void the transfer under the Insolvent Debtors Act.

No one appearing to show cause, —

Hodges now moved to make the rule absolute: and mentioned that the point whether the judgment could be removed under these circumstances was one of considerable importance, and was brought before the Court on the suggestion of Martin, B., before whom the matter had been heard at chambers.

MARTIN, B. The doubt I entertained was whether as the County Court Act obviously showed an intention that there should be no imprisonment except for fraud, and the party here had been already imprisoned for the fraud committed, the judgment could afterwards be removed into the Superior Court with a view to a further imprisonment.

The COURT, without further observation, made the — *Rule absolute.*

PALMER v. RICHARDS.¹

Hilary Term, January 11, 1851.

Indorsement of Bill of Exchange.

The drawer of a bill of exchange which had been accepted, wrote his name across the back of the bill, and delivered it to A to get discounted; who instead thereof, while the bill was running, deposited it with B as security for money advanced to himself, without fraud on the part of B:—

Held, that this was a valid indorsement of the bill by the drawer to B.

THIS was an action on a bill of exchange for 50*l.*, drawn by T. W. Edwards, on, and accepted by, the defendant, indorsed by Edwards to W. Tingey, and by Tingey to the plaintiff. The defendant pleaded several pleas, the only material one being a traverse of the indorsement by Edwards to Tingey. At the trial, before the Lord Chief Baron, it appeared that after the bill had been accepted by the defendant, Edwards wrote his name across the back and gave it to one Brown to get discounted; who instead thereof deposited the bill, still running, with Tingey as a security for 13*l.* 7*s.*, advanced by Tingey to himself. There was no proof of any fraud on the part of Tingey. On these facts the plaintiff had a verdict; leave being reserved to enter a nonsuit, if the Court should think the allegation of the indorsement from Edwards to Tingey not proved.

Humfrey moved accordingly. The case of *Lloyd v. Howard*, 20 Law. J. Rep. (N. S.) Q. B. 1, (*ante*, p. 227,) is an authority in point. That was an action by the second indorsee against the acceptor of a bill of exchange: the defendant being desirous to raise money, made the bill and delivered it to the drawer for that purpose, who wrote his name on it, and gave it to M. to get discounted, who neglected to do so; and the bill ultimately came into the hands of the plaintiff after it was due, and without consideration. On these facts the Court held that there was no indorsement from the drawer to M., and doubted if there were one from M. to the plaintiff. [*Pollock*, C. B.—There the bill was overdue when it came into the hands of the plaintiff.] Lord Campbell there says, “The merely writing a party’s name upon the bill and another person’s obtaining possession of it without his privity, is not sufficient; nor is the indorsement sufficient if the bill be afterwards given to another for a collateral purpose, for which only the indorsement was made.” If a man indorses a bill and delivers it to his servant to pay a certain tradesman with, and the servant’s pocket is picked of the bill, or he improperly gives it to a third person, the thief or that third person could not treat the bill as having been indorsed to himself.

PARKE, B. I think this was a perfectly good indorsement from Edwards to Tingey. If the allegation in the declaration were that

there had been an indorsement of this bill from Edwards to Brown, it would be a question of fact whether the writing of Edwards's name on the back of the instrument, accompanied by a delivery of it to Brown, meant to transfer the property in the bill to him so as to enable him to indorse it as his own, or merely to hand it over to another party. As to the case which has been cited of *Lloyd v. Howard*, I think the decision there was perfectly right, and an authority for saying that here was no indorsement from Edwards to Brown; for the mere writing of a man's name on the back of an instrument is not enough for that purpose; it is only one act towards it; and *Lloyd v. Howard* shows that the writing the name and handing the instrument to a third person, without any intention to pass the property in it to that person, is insufficient to constitute an indorsement to that person. But if a man writes his name on the back of a bill of exchange in order that it may be negotiated, and any person afterwards receives it for value, it does not lie in the indorser's mouth to say that the bill was not indorsed to that person: and it has been the established rule ever since the case of *Collins v. Martin*, 1 B. & P. 648, that any person who thus takes a bill for value is the indorsee of it. I think that Edwards, by putting his name on the back of this bill, and putting it into the hands of his agent with authority to represent him, who hands it over to a third party, ought not to be permitted to say that he did not indorse it to any person who took it for value from his agent. The question therefore here is, whether, there being no proof of any fraud in Tingey, he may not be considered a holder of the bill, and Edwards as having indorsed it to him. The case is distinguishable from *Lloyd v. Howard* in this, that if this bill were indorsed to Brown solely with the view to enable him to pass it away, and not to treat him as owner of the bill himself, no property passed from Edwards to him; and if such property had been alleged, the case of *Lloyd v. Howard* would apply. But that decision does not hold with respect to a third person who received it from the agent whom Edwards intrusted with it, and who has paid value for it.

ALDERSON, B. I do not see any distinction between this case and the principles laid down in *Marston v. Allen*, 8 M. & W. 494; s. c. 11 Law J. Rep. (N. S.) Exch. 122, where this subject came before us, and we took a great deal of pains to consider it. In delivering judgment there, we said, "We think it better to say, that by the law merchant every person having possession of a bill has (notwithstanding any fraud on his part either in acquiring or transferring it) full authority to transfer such bill, but with this limitation, that to make such transfer valid there must be a delivery, either by him or by some subsequent holder of the bill, to some one who receives such bill *bona fide* and for value."

MARTIN, B. I am of the same opinion. Mr. Humfrey's argument would make bills of exchange not negotiable at all. Suppose Brown had had his pocket picked of this bill, then the bill would be generally

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indorsed, and any person giving *bona fide* value for it might treat it as a negotiable instrument. The case is clearly distinguishable from *Lloyd v. Howard*. It is not to be supposed that persons like Brown, who deal in these instruments, do not understand their business, and are not aware that the allegation of an indorsement to a person in his situation would fail, while if the bill was passed to a third party for value he would be clearly entitled to recover on it. All this is entirely beside the questions of equity arising from the bill being overdue. What my brother Alderson has cited from *Marston v. Allen* is quite clear.

POLLOCK, C. B. I expressed my opinion at the trial. I told the jury it would be to put in peril the law merchant with reference to bills of exchange if we were to hold this not a good indorsement. I think the Courts ought, as far as they can, to repress the abuses of bills of exchange by persons who are merely swindlers and fraudulent dealers in them, and make use of them to defraud the public; but although we ought to do that, we must not forget of how great importance it is to the mercantile world, that a man who takes a bill takes it as an available security. According to the argument to-day, a man, before he can take a bill with safety, must inquire if it passed to a previous holder not on general but on a particular indorsement. Now the case of *Lloyd v. Howard* distinctly decides this only, that where A delivers a bill to B for a special purpose, putting his name on the back of it for that purpose, and does not intend to make him owner, it is not an indorsement in law to that man, and it is only a delivery to him for a special purpose; but which delivery, however, gives him authority over it so as to enable him to convey a title to a third person. *Lloyd v. Howard* shows that as between the drawer and his agent in that case there was no indorsement; and in this case, as between Edwards and Brown, there may have been no intention to give Brown a right to the bill, although by virtue of the general indorsement and delivery he had power to give a title to it. That case is, therefore, quite distinguishable from the present. — *Rule refused.*

 MILNER v. FIELD.¹

November 25, 1850.

Contract — Condition Precedent — Fraud.

A building contract between A and B contained a proviso that the payments thereby agreed to be made by B should only be due provided the certificate of the surveyor of B, for the time being, should first be obtained. A having sued in *indebitatus assumpsit* for the balance alleged to be due: —

Held, that under the general issue, the absence of the certificate was a good answer to the

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action, and that the plaintiff was not at liberty to show that it was withheld fraudulently and in collusion with the defendant.

ASSUMPSIT for goods sold and delivered, work and labor and materials, and on an account stated.

Pleas: Never indebted; payment; and set-off. Issues thereon.

At the trial, at the last Surrey Summer Assizes, before Pollock, C. B., it appeared, on behalf of the plaintiff, that the work sued for was done under a written contract not under seal, by which the plaintiff agreed to build thirty houses for 3,130*l.*, to be paid by certain instalments, as the work progressed. There were penalties for non-performance by the plaintiff, and also a proviso that none of the instalments should be due unless the plaintiff should deliver to the defendant a certificate, signed by the surveyor, for the time being, of the defendant, that the works had been, in all respects, well and substantially performed, according to the specifications and plans. Some of the instalments were paid, and the action was brought to recover the balance. No certificate was obtained, but it was proposed to show that the defendant had appointed his own father as his surveyor; and that although the work was done in every respect correctly, the certificate was fraudulently, and by collusion with the defendant, withheld. His Lordship nonsuited the plaintiff, with liberty to take the opinion of the Court, whether this objection was open upon the pleadings; if so, the cause to be referred.

Lush now moved accordingly. The defendant has paid large sums without the proviso having been complied with, and either he ought to have extended the proviso, or the plaintiff ought to have been allowed to give evidence of fraud.

[POLLOCK, C. B. You have declared upon an executed contract.]
— *Cur. adv. vult.*

Judgment was now delivered by

POLLOCK, C. B. No rule will be granted in this case. Where, by the contract itself, the certificate of the surveyor is made a condition precedent to the right to payment, even if it is withheld by fraud, that is only the subject of a cross action. The nonsuit was, therefore, right. — *Rule refused.*

CROWN CASES RESERVED
FOR THE CONSIDERATION AND DECISION
OF THE
COURT OF CRIMINAL APPEAL;¹
DURING THE YEARS 1850 AND 1851.

[Before LORD CAMPBELL, C. J., PARKE and ALDERSON, BB., CRESSWELL and ERLE, JJ.]

REGINA v. JONES.²

April 27, 1850.

Stat. 7 & 8 Geo. 4, c. 29, s. 53 — False Pretences — Begging Letters — Venue.

A begging letter, making false representations as to the condition and character of the writer, by means of which money is obtained, is a false pretence within the statute.

Where the prisoner, in a begging letter, which contained false pretences, and was addressed to the prosecutor, who resided in Middlesex, requested him to put a letter, containing a post-office order for money, in a post-office in Middlesex, to be forwarded to the prisoner's address in Kent:—

Held, that the venue was rightly laid in Middlesex, as the prisoner, by directing the money order to be sent by post, constituted the postmaster in Middlesex his agent to receive it there for him; and that, consequently, there was a receipt of the money order by the prisoner within the county of Middlesex.

JOHN THOMAS SIMPSON JONES was indicted at the Middlesex Sessions for obtaining, by false pretences, a post-office order for the pay-

¹ The Court of CRIMINAL APPEAL was constituted under the statute 11 & 12 Vict. c. 78, (August, 1848,) which is entitled, "An Act for the further Amendment of the Administration of the Criminal Law."

By this Act,—after reciting that it is expedient to provide a better mode than that now in use of deciding any difficult question of law which may arise in any criminal trials in any Court of Oyer and Terminer and jail delivery, and to make further amendments in the administration of the criminal law,—it is enacted:—

I. That when any person shall have been convicted of any treason, felony, or misdemeanor, before any Court of Oyer and Terminer or jail delivery, or Court of Quarter Sessions, the Judge, or Commissioner, or Justices of the Peace, before whom the case shall have been tried, may, in his or their discretion, reserve any question of law which shall have arisen on the trial for the consideration of the Justices of either Bench and Barons of the Exchequer; and thereupon shall have authority to respite execution of the judgment on such conviction, or postpone the judgment until such question shall have been considered and decided, as he or they may think fit; and, in either case, the Court in its discretion shall commit the person convicted to prison, or shall take a recognizance of bail, with one or two sufficient sureties, and in such sum as the Court shall think fit, conditioned to appear at such time or times as the Court shall direct and receive judgment, or to render himself in execution, as the case may be.

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ment of 3*l.*, of the goods and chattels of John Collinridge, with intent to cheat and defraud him of the same; and, in the other counts, for obtaining a 5*l.* bank-note and two pieces of paper, to wit, two halves of a 5*l.* bank-note, of the value of 1*s.*, of the goods, chattels, and moneys of the said John Collinridge, with intent to cheat and de-

II. That the Judge, or Commissioner, or Court of Quarter Sessions, shall thereupon state, in a case signed in the manner now usual, the question or questions of law which shall have been so reserved, with the special circumstances upon which the same shall have arisen; and such case shall be transmitted to the said Justices and Barons; and the said Justices and Barons shall thereupon have full power and authority to hear and finally determine the said question or questions, and thereupon to reverse, affirm, or amend any judgment which shall have been given on the indictment or inquisition on the trial whereof such question or questions have arisen, or to avoid such judgment, and to order an entry to be made on the record, that, in the judgment of the said Justices and Barons, the party convicted ought not to have been convicted, or to arrest the judgment, or order judgment to be given thereon at some other Session of Oyer and Terminer or jail delivery, or other Sessions of the Peace, if no judgment shall have been before that time given, as they shall be advised, or to make such other order as justice may require; and such judgment and order, if any, of the said Justices and Barons, shall be certified under the hand of the presiding Chief Justice or Chief Baron to the clerk of assize, or his deputy, or the clerk of the peace, or his deputy, as the case may be, who shall enter the same on the original record in proper form; and a certificate of such entry, under the hand of the clerk of assize, or his deputy, or the clerk of the peace, or his deputy, as the case may be, in the form, as near as may be, or to the effect mentioned in the schedule annexed to this Act, with the necessary alterations to adapt it to the circumstances of the case, shall be delivered or transmitted by him to the sheriff or jailer in whose custody the person convicted shall be; and the said certificate shall be a sufficient warrant to such sheriff or jailer, and all other persons, for the execution of the judgment, as the same shall be so certified to have been affirmed or amended, and execution shall be thereupon executed on such judgment, and for the discharge of the person convicted from further imprisonment, if the judgment shall be reversed, avoided, or arrested, and in that case such sheriff or jailer shall forthwith discharge him, and also the next Court of Oyer and Terminer and jail delivery, or Sessions of the Peace, shall vacate the recognizance of bail, if any; and if the Court of Oyer and Terminer and jail delivery, or Court of Quarter Sessions, shall be directed to give judgment, the said Court shall proceed to give judgment at the next Session.

III. That the jurisdiction and authorities by this Act given to the said Justices of either Bench, and Barons of the Exchequer, shall and may be exercised by the said Justices and Barons, or five of them at least, of whom the Lord Chief Justice of the Court of Queen's Bench, the Lord Chief Justice of the Court of Common Pleas, and the Lord Chief Baron of the Court of Exchequer, or one of such chiefs at least, shall be part, being met in the Exchequer Chamber or other convenient place; and the judgment or judgments of the said Justices and Barons shall be delivered in open court, after hearing counsel or the parties, in case the prosecutor or the person convicted shall think it fit that the case shall be argued, in like manner as the judgments of the Superior Courts of common law at Westminster or Dublin, as the case may be, are now delivered.

IV. That the said Justices and Barons, when a case has been reserved for their opinion, shall have power, if they think fit, to cause the case or certificate to be sent back for amendment, and thereupon the same shall be amended accordingly, and judgment shall be delivered after it shall have been amended.

V. That whenever any writ of error shall be brought upon any judgment, on any indictment, information, presentment, or inquisition, in any criminal case, and the Court of Error shall reverse the judgment, it shall be competent for such Court of Error either to pronounce the proper judgment or to remit the record to the Court below, in order that such Court may pronounce the proper judgment upon such indictment, information, presentment, or inquisition.

VI. That every person who shall forge or alter, or shall offer, utter, dispose of, or

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fraud him thereof. It was proved in evidence that the prosecutor resided at Sunbury, in Middlesex, having a house also at Bath; but that at the time of his receiving the letter hereinafter first mentioned, he was at his house at Sunbury, and the prisoner at Vauxhall road, in the same county; and, with respect to the first charge, that the prisoner wrote, at his residence, the letter, of which the following is a copy, with intent to defraud the prosecutor, and assumed a name to which he had no right, viz., that of Dr. Scott, subscribed to the letter:—

“Gravesend, July 30, 1849.

“SIR,—Permit me to address you in a case of charity, at the earnest entreaty of James Brewer, a young man whom you have been very kind to upon several occasions, and, some months ago, you gave him 1*l.* 3*s.*, to take him to Leamington. He was ordered there for the benefit of sea-bathing, but the air being too keen for his delicate frame, he has been advised to endeavor to gain admission into a consumption hospital, Brompton, near London. He is in very distressed circumstances, and has no means of paying the fees of that institution, and is also indebted here, to his landlady, for board, &c. Your kindness to him before, induces him to hope that you might, once more and for the last time, render him some little assistance, to enable him to make up 50*s.*, all that he is deficient of. I have taken more than usual interest in his case, having given him some linen, and 1*l.* 10*s.* in cash, which is as much as my limited means will admit me to do. The sad intelligence of a death in my family obliges me to leave home in a few hours for Scotland, and will be absent some weeks; therefore, you will be pleased to return an answer to the poor youth himself, along with the enclosure, which is of importance to him, addressed ‘James Brewer, Post-office, Gravesend, Kent, to be left till called for;’ and I have instructed Miss Scott, my sister, to acknowledge the receipt for him. Trusting the motive which actuates me in complying with the request will be deemed an apology,

“I am, your obedient servant,

“JOHN H. SCOTT, M. D.

“To John Collinridge, Esq., Bath.”

That the prisoner delivered the letter to an accomplice, at his residence in Middlesex, with instructions to put it into the post-office at Gravesend, to be there posted. That the same was posted accordingly, and duly received by the prosecutor in Middlesex, it having

put off, knowing the same to be forged or altered, any certificate of, or copy certified by, a Chief Justice, or any certificate of, or copy certified by, a clerk of assize, or his deputy, or the clerk of the peace, or his deputy, as the case may be, with intent to cause any person to be discharged from custody, or otherwise prevent the due course of justice, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond seas for any term not exceeding ten years, or be imprisoned for any term not exceeding three years, with or without hard labor and solitary confinement, both or either, at the discretion of the Court before which he shall be tried.

VII. That this Act shall not extend to Scotland.

VIII. That this Act may be amended or repealed by any Act to be passed during this present session of Parliament.

been forwarded from Bath, in the County of Somerset, to him at Sunbury. He, therefore, believing the story told in the said letter to be true, and that it had been written by a Dr. Scott, obtained a post-office order at Sunbury for the sum of 3*l.*, as laid in the indictment, in favor of James Brewer, and having inclosed the sum in a sealed envelope, addressed "James Brewer, Post-office, Gravesend, Kent," put it into the Sunbury post-office, where it was transmitted by course of post to Gravesend, in the county of Kent, and there received by the accomplice, (under the prisoner's instructions,) who got the money for the order, and gave half the proceeds to the prisoner, at his residence in Vauxhall road, keeping the other half himself. The pretences were each and every of them false, to the prisoner's knowledge, and the letter was written with intent to cheat and defraud the prosecutor, and obtain money from him, and the name of Scott was assumed for that purpose. With respect to the second charge, it was proved that the prisoner wrote and posted another begging letter from Bath; that this letter was duly received at Sunbury by the prosecutor, who thereupon believing the contents to be true, and that it was written by a person bearing the name of John Henry Collinridge, enclosed one half of a 5*l.* note in a letter, addressed "Mr. J. H. Collinridge, (to be called for,) late from Africa, Post-office, Chippenham, Wilts," and forwarded it by post from Sunbury to Chippenham, in the County of Wilts, where it was received by the prisoner, who thereupon requested the prosecutor, by letter, to forward the second half of the note, by post, to his residence in Middlesex, and which the prosecutor, who was then still at Sunbury, and wrote from thence, accordingly did, and the prisoner received it there, and, by letter, duly acknowledged the receipt of such half note there. The letter was written by the prisoner himself, with intent to defraud the prosecutor of his money, and he knew the contents to be false, assuming, for the purpose of such fraud, the name of John Henry Collinridge, to which he was not, and never had been, entitled. Three points were taken by the prisoner's counsel as to both charges: first, that neither of them were offences within the meaning of the statute; that the post-office order and the 5*l.* were mere voluntary gifts, and that the statute did not apply to voluntary charitable gifts: secondly, as to the first charge, that the same, if triable any where, was only triable in the county in which the post-office order was received, and that it was received in the County of Kent; thirdly, as to the second charge, that one half of the bank-note having been received in Wiltshire, and the other half in Middlesex, the bank-note was not received in Middlesex; and that, with respect to the charge of obtaining two pieces of paper, to wit, two halves of a Bank of England note, value 1*s.*, the same did not constitute an offence, because the halves were, of themselves and distant from each other, valueless. The jury found the prisoner guilty, subject to a case for the opinion of this Court.

Phinn now appeared for the Crown. (No counsel appeared on behalf of the prisoner.) The 33 Hen. 8, c. 1, met the case of obtaining money by counterfeit letters in other men's names. The 7 & 8 Geo. 4,

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c. 29, consolidated all the previous acts respecting false pretences. *Rex v. Young*, 3 T. R. 98; 1 Leach's C. C. 505; *Villeveuve's Case*, 3 T. R. 104; *Rex v. Crossley*, 2 Moo. & R. 18. [Lord Campbell, C. J. — We have no doubt that this is a false pretence.] The question then remains as to the venue. The offence was properly tried in Middlesex. The letters, containing the post-office order and the bank-notes, were posted in the County of Middlesex, at the prisoner's desire. [Parke, B. — By directing the prosecutor to send the money by post, the prisoner constituted the post-master his agent, to receive the money for him. The post-office order for 3*l.*, and the halves of the bank-note, were put into the post by the prosecutor, at Sunbury, in the County of Middlesex, inclosed in letters addressed to the prisoner, at his request, and were received there by the postmaster; consequently, that amounted to a receipt of them by the prisoner, within the County of Middlesex.] The 12th sect. of the 7 Geo. 4, c. 64, provides that, where a felony or misdemeanor is begun in one county and completed in another, the venue may be laid in either county, in the same manner as if it had been wholly committed therein. [Erle, J. — But the Court are of opinion that there was a receipt in Middlesex.

LORD CAMPBELL, C. J. We are of opinion that the prisoner was rightly convicted. — *Conviction affirmed.*¹

[Before LORD CAMPBELL, C. J., PARKE and ALDERSON, BB., CRESSWELL and ERLE, JJ.]

REGINA v. WOOLLEY.²

April 27, 1850.

False Pretences — 7 & 8 Geo. 4, c. 29.

Where the secretary of an Odd Fellows Society falsely pretended to a member of the society that the sum of 13*s.* 9*d.* was due by him to the society for fines incurred by him as a member, by means of which such secretary fraudulently obtained from him that sum of money: —

Held to be a false pretence within the stat. 7 & 8 Geo. 4, c. 29.

¹ So where threatening letters are written and mailed in one county, and directed to, and received by, the person to whom they are addressed in another county, the indictment for sending such letters may properly be found in the latter county. *The People v. Griffin*, 2 Barbour, Sup. Ct. Rep. 427. And in like manner, where A, residing in Ohio, sent by innocent agents to a firm of commission merchants in New York city, forged receipts, purporting to be signed by a certain forwarder in Ohio,

acknowledging the receipt by him, from A, of certain goods for, and on account of, the said firm in New York, upon which A obtained advancements from said firm, it was held, that the crime was committed in New York, although the defendant had never been in New York, and the receipts were drawn and signed in Ohio. *People v. Adams*, 3 Denio, 190; s. c. 1 Comstock, 173. See *United States v. Worrall*, 2 Dallas, 388.

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THE prisoner was tried and convicted, before Patteson, J., at the last Assizes at Stafford, on an indictment, which charged, in the first count, that he was secretary to the Earl of Uxbridge Lodge of Odd Fellows, at Burton-upon-Trent; that Joseph Buxton was a member, and indebted thereto in 2s. 2d.; that the defendant falsely pretended to Buxton that the sum of 13s. 9d. was due from him to the lodge, and thereby obtained from him 1 sovereign, 1 half-sovereign, 3 crowns, 4 half-crowns, 11 shillings, 23 sixpences, 139 pence, and 278 half-pence, of the moneys of Buxton, with intent to cheat and defraud him; and whereas, &c. The second count alleged the obtaining of the same moneys, omitting the sovereign and half-sovereign. The third count was for falsely pretending to Joseph Buxton that 13s. 9d. would be due and owing on the 20th November, 1848, to a certain society, called "The Earl of Uxbridge Lodge of Odd Fellows," and obtaining 13s. 9d. Fourth count, obtaining 13s. 9d. Fifth count, unlawfully demanding, having, and receiving 13s. 9d. It appeared in evidence that Joseph Buxton was a member of the lodge; that his contribution was 9d. per fortnight; that the prisoner was permanent secretary to the lodge, with a salary; that it was his duty to receive money from the members in lodge hours, but he had no authority to receive any out of the lodge; that on the 17th November the prisoner himself brought and tendered to Buxton, out of the lodge, a writing or summons in the words following:—

"Earl of Uxbridge Lodge, Burton-upon-Trent, Nov. 14, 1848.

"Sir and Br. (Brother): I hereby give you notice, that you owe to your lodge, for contributions, &c., the sum of 13s. 9d., due on the 20th instant.

Yours, respectfully,

"To Mr. Joseph Buxton.

WILLIAM WOOLLEY."

The 20th November was the next lodge night after the 14th. The prisoner said, "I have brought you a summons for the money you owe the lodge." Buxton opened the paper and said, "Do I owe that amount—13s. 9d.?" The prisoner said, "You do." Buxton said, "It is not long since I paid at the lodge to you." Prisoner said, "That is what you owe." Buxton said, "Very well," and paid him 14s., and received 3d. in change, but Buxton could not recollect in what coin he paid, except that there were half-crowns. Buxton had never paid money out of the lodge before; he never paid any more, nor went to the lodge afterwards. The prisoner wrote on the paper:

"Nov. 17, 1848.

"Received 13s. 9d. on this account.

WILLIAM WOOLLEY."

It appears by the books of the lodge, in the prisoner's writing, that Buxton had paid 3s. 9d. on the 23d October, at the lodge, and that on the 20th November two sums of 9d. and a subscription of 8d. were due from him. The prisoner accounted to the treasurer on the 20th November, and paid him 4l. 11s. 1d., but no sum of 13s. 9d. from Buxton. There was no entry on the 20th November of any fine inflicted on Buxton, but there was an entry, in the prisoner's writing, of a fine of 1s. on him on the 4th December. Fines are entered at the

time they are inflicted. On the 22d October, 1849, there is an entry against Buxton's name, "21s. 10d. Expelled." Mr. Vaughan, for the prisoner, objected, first, that there was no false pretence within the stat. 7 & 8 Geo. 4, c. 29, s. 53; that the fact of what was due was as much within the knowledge of Buxton as of the prisoner; that it was no more a false pretence than if a creditor should say, "You owe me 5*l*," when the debt was only 2*l*., and so obtained 5*l*. See *Rex v. Urthell*, 2 East's P. C. 830; *Rex v. Johnson*, 2 Moo. C. C. 254; *Rex v. Ball*, 1 Car. & M. 249; and *Reg. v. Reed*, 9 Car. & P. 848. Secondly, that if there was any false pretence, it was the paper or the summons, which, therefore, ought to be set forth in the indictment. See Stark on Crim. Pl. 97. On the other side it was contended that the false pretence was the oral assertion of the prisoner, who himself brought the paper, signed by himself, stating that the money was due. See *Hamilton v. Reg.*, 16 Law J. Rep. (N. S.) M. C. 7. The same prisoner was also convicted on an indictment charging him with obtaining a sovereign from William Buxton by false pretences, with intent to defraud him. The indictment was in a similar form to the preceding one. The prisoner was found guilty on both indictments; and the learned Judge reserved a case for this Court, whether the conviction could be sustained upon one or any of the counts of the indictment.

Vaughan now appeared for the prisoner. It is submitted that there is not here a false pretence within the stat. 7 & 8 Geo. 4, c. 29. One class of false pretences was where a false representation, as to the state or situation in life of some third person, was made by a prisoner, which operated on the mind of a party to part with his money. *Reg. v. Douglas*, 1 Camp. 212; *Reg. v. Wickham*, 10 Ad. & El. 34; 8 Law J. Rep. (N. S.) M. C. 87. Another class was where there was a representation of a fact which had not happened. *Reg. v. Young*, 3 T. R. 98. Then there was the case where the name of a third party was employed, without authority, to induce a person to part with money. *Coleman's Case*, 2 East's P. C. 672. In all these cases the party to whom the false pretence was made had no means, *then and there*, of knowing whether the representations were true or false. [Lord Campbell, C. J. — What is your definition of a false pretence? In almost all cases of false pretences, the party has an opportunity of making inquiries. May it not be the intention of the legislature to prevent frauds easily made, although there are the means of inquiry? Suppose a man represents himself to be a tax-gatherer, demands 10*l*. for the window-tax, and obtains it, the householder has the means of inquiry; but here is a false representation of an existing fact, which would be a false pretence with the statute. Parke, B. — There is a very good note on this subject in 2 Russ. Cr. 289; the jury are to find whether the pretence is likely to impose upon another.]

Huddleston and *M' Mahon*, for the Crown, were not called upon.

LORD CAMPBELL, C. J. If a tradesman, knowing nothing to be due,

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and having the fraudulent intention of inducing a person, by the false representation, to give him money, says, "You owe me so much," and that person pays him, trusting to his representation, I should not like to be in the situation of that person. I agree with all that Lord Denman laid down in the case of *Reg. v. Reed*. — *Conviction affirmed.*

[*Before* LORD CAMPBELL, C. J., PARKE and ALDERSON, BB., CRESSWELL and ERLE, JJ.]

REGINA v. SANSOME.¹

April 27, 1850.

11 & 12 Vict. c. 42, s. 18 — *Prisoner's Statement — Caution.*

The second caution in the 18th section of the 11 & 12 Vict. c. 42, is only necessary where some previous inducement or threat has been held out.

There is nothing in the statute to exclude a confession which would have been admissible at common law.

If the prisoner's statement be returned purporting to be signed by the magistrate, and bearing on the face of it the first caution, it is admissible without any other evidence.

THE prisoner was tried at the last Assizes for Nottinghamshire for the murder of a woman. For the prosecution, there was offered in evidence a declaration made in the form directed by the schedule of the 11 & 12 Vict. c. 42. The magistrate's clerk, who was called to prove it, stated, that when the prisoner was before the magistrate, the witnesses for the prosecution being examined in his presence, the magistrate thus addressed him: "Having heard the evidence, do you wish to say any thing in answer to the charge? You are not obliged to say any thing unless you desire to do so; but whatever you say will be taken down in writing, and may be given in evidence against you at your trial." That the magistrate added nothing more; that the prisoner then made the declaration, which was taken down, read over to him, and signed by him; and that it was signed by the magistrate. The prisoner's counsel objected, that, under the 11 & 12 Vict. c. 42, s. 18, the declaration was not admissible, as the magistrate had not stated to the prisoner, nor given him clearly to understand, "that he had nothing to hope from any promise of favor, and nothing to fear from any threat, which might have been holden out to him, to induce him to make any admission or confession of his guilt, but that whatever he should then say might be given in evidence upon his trial, notwithstanding such promise or threat." The learned Judge admitted the declaration, and reserved the point for the consideration of this Court. The prisoner was found guilty, and sentence was passed upon him.

Mellor now appeared for the prisoner. Before the recent statute, a statement made under the influence of hope or fear was always held

¹ 19 Law J. Rep. (n. s.) M. C. 143. 14 Jur. 466.

to be inadmissible, if the inducement were held out by a party having authority, a justice, master, constable, &c. There were questions among the Judges, whether a caution by the magistrate could do away with an inducement previously made. *Reg. v. Arnold*, 8 Car. & P. 621. *Rex v. Green and others*, 5 Car. & P. 312. It was ruled by Lord Denman, C. J., that, before a statement could be received, the magistrate ought to get rid of any previous inducement. The 18th section of the new statute, the 11 & 12 Vict. c. 42, follows the ruling of Lord Denman, C. J. What I should contend is, that the object of that statute is to prevent questions as to whether a proper caution had or had not been given, to put an end to nice questions as to the sufficiency of the caution, and to establish one uniform mode of proceeding. The object of the 18th section is not only to facilitate proof, but to define the duties of justices. The statute assumes that the prisoner may be under the influence of some previous threat or inducement, and therefore requires the magistrate to give a particular caution before he receives any statement of the prisoner. [*Lord Campbell*, C. J. — Why is not this statement admissible at common law? It is proved that the prisoner signed it.] This statement purports to have been made under the statute, but it is not. [*Alderson*, B. — The statute requires the caution where a previous threat or inducement has been held out; but where there has been no previous threat or inducement, the caution is not necessary. *Parke*, B. — Is the proviso a condition precedent? *Alderson*, B. — The 18th section makes the statement admissible upon mere production, if there is no evidence of any previous inducement or threat. If there is such evidence, and the caution required by the statute has been given, that is enough.] That advantage is very trifling.

S. C. Denison, for the Crown, was not called upon.

LORD CAMPBELL, C. J. We are all of opinion that the objection is unfounded. I entertained no doubt upon the point myself, but I thought that it was desirable that all doubts upon the subject should be set at rest. Now, in this case, not only is the signature of the magistrate to this statement proved, but also the signature of the prisoner himself, after it had been read over to him. It was, therefore, admissible at the common law, and was receivable in evidence at the trial, unless there is something in the new statute which prevents its reception. It has been argued that the 11 & 12 Vict. c. 2, makes it a condition precedent that the magistrate should state to the prisoner, and give him clearly to understand, that he has nothing to hope from any promise of favor, and nothing to fear from any threat, which may have been holden out to him to induce him to make a confession or an admission of his guilt, but that whatever he shall then say may be given in evidence against him upon his trial, notwithstanding any such threat or promise. In this case there was no promise or threat of any kind, and therefore there could be no necessity for showing that any caution had been given; for I am of opinion that the giving of such caution cannot be a condition precedent to the admissibility

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of every declaration made by a prisoner before a magistrate, read over to him and signed by him. It seems to me that the proviso contains merely a direction to the magistrate how to proceed, and is not a condition precedent. If he neglects his duty there is no clause of nullity in the statute, nothing to exclude a confession which would be admissible at common law. The form prescribed by the schedule of the statute has been adopted in the present case; and that schedule contains the first caution, but not the second. The second caution is not, where there is no evidence of a previous threat or promise, a condition precedent.

PARKE and ALDERSON, BB., and CRESSWELL, J., concurred.

ERLE, J. I am of the same opinion. It may now be desirable for this Court to state their opinion upon the other question, whether the examination, when transmitted by the committing magistrates in the statutory form, is admissible *without further proof*; and my opinion is, that if the first caution is stated to have been given as in the form in the schedule, and that the examination is transmitted in due course by the committing magistrate to the Court before which the trial is to take place, the statement is then admissible without any further proof.

LORD CAMPBELL, C. J. I entirely concur in that opinion.

PARKE, B. *Prima facie* the examination is right if it "purports" to be signed by the magistrate, and if there is no evidence that he did not sign it.

LORD CAMPBELL, C. J. We are all agreed upon this, that if the prisoner's statement is returned purporting to be signed by the magistrate, and bearing on the face of it the first caution, it is admissible without any other evidence. — *Conviction affirmed.*

[Before LORD CAMPBELL, C. J., PARKE and ALDERSON, BB., CRESSWELL and ERLE, JJ.]

REGINA v. THOMPSON.¹

April 27, 1850.

Larceny by an Adulterer.

Where the prisoner went away with the prosecutor's wife, and assisted her in placing wearing apparel and other articles in a box; also in removing the box from her husband's house; afterwards, while the prosecutor's wife remained in adultery with him, pledging some of the articles and applying the money to his own purposes: —

Held, that the direction of the Chairman of the Quarter Sessions to the jury, —

First, that if they were of opinion that the prisoner, going away with the prosecutor's wife

¹ Den. C. C. R. 549. 14 Jur. 488.

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for the purpose of adulterous intercourse, was engaged jointly with her in taking the goods; or,—

Secondly, that if the prisoner, though not a party to the original taking of the goods, or their removal after the arrival of the adulteress and himself at his house, had appropriated any part of the goods to his own use, he was guilty of the felony, was a proper direction, and that the prisoner was rightly convicted of larceny.

JAMES THOMPSON was indicted at the Quarter Sessions for the County of Lancaster, held at Salford, on the 17th January, 1850, and was found guilty of stealing nine gowns, two brass candlesticks, one coffee-pot, one dining-table, two aprons, two pairs of boots, two pairs of shoes, four shawls, two pairs of stockings, two sheets, and two silk handkerchiefs, the property of Thomas Edgerton. The evidence showed that the prisoner, who worked and lodged at the prosecutor's house, went away, on the 4th January, 1848, with the prosecutor's wife: that they went to Birmingham, where they lived together as man and wife for more than a year: that they took with them from the prosecutor's house a box belonging to the prisoner, containing the wife's wearing apparel, and also a coffee-pot and two candlesticks, the property of the prosecutor. The wife of the prosecutor was examined, and gave very contradictory evidence as to what passed at the time of leaving the prosecutor's house. She stated, however, as part of her evidence, that the prisoner assisted in placing the things in the box, and in removing the box from the cellar to the cart in which it was taken away. It appeared further, that on the parties' arriving at Birmingham, the box was opened, and the prisoner saw its contents: that the coffee-pot and candlesticks were used by them in their house at Birmingham, and that these articles were afterwards sold by the prosecutor's wife: that the prisoner then pledged some articles of the wearing apparel, and applied the money for his own purposes. The chairman, in summing up, directed the jury to find the prisoner guilty, if they came to the one or the other of the following conclusions—either, first, that the prisoner, going away with the prosecutor's wife for the purpose of adulterous intercourse, was engaged jointly with her in taking the goods; or, secondly, that, not being a party to the original taking or removal, the prisoner, after arriving at Birmingham, appropriated any part of the goods to his own use. The jury found the prisoner guilty, adding that they did so on the ground that there was a joint taking by the prisoner and the prosecutor's wife. The counsel for the prisoner applied to the Court to reserve the question, and the cases of *Reg. v. Clark*, 1 Moo. C. C. 376, note *a*; and *Reg. v. Rosenberg*, 1 Car. & K. 233, were cited. The Court of Quarter Sessions acceded to the application, and submitted to this Court the question, whether the case was properly left to the jury, and the conviction good. The case was not argued by counsel.

LORD CAMPBELL, C. J., said that the Judges were of opinion that the conviction was a proper one. — *Conviction affirmed.*

Regina v. Case.

[Before WILDE, C. J., PATTESON, J., ALDERSON, B., COLERIDGE, J., and PLATT, B.]

REGINA v. CASE.¹

June 1, 1850.

Assault by a Medical Practitioner on a Female Patient.

Where a medical practitioner had sexual connection with a female patient of the age of fourteen years, who had for some time been receiving medical treatment from him : —

Held, that he was guilty of an assault, the jury having found that she was ignorant of the nature of the defendant's act, and made no resistance, solely from a *bona fide* belief that the defendant was (as he represented) treating her medically, with a view to her cure.

Semble, that the prisoner might have been indicted for rape.

WILLIAM CASE was tried, before W. H. Bodkin, Esq., Recorder of Dover, at the last April Quarter Sessions for the borough, held at Dover, for an assault upon Mary Impett. The defendant was a medical practitioner, and Mary Impett, who was fourteen years old, was placed under his professional care by her parents, in consequence of illness arising from suppressed menstruation. The defendant gave her medicines, and on one occasion of her going to his house and informing him that she was no better, he observed, "Then I must try other means with you." He then took hold of her, and laid her down in his surgery, lifted up her clothes, and had carnal connection with her, she making no resistance, believing (as she stated) that she was submitting to medical treatment for the ailment under which she labored. The defendant's counsel, in his address to the jury, contended that the girl was a consenting party, and therefore that the charge of assault was not sustained. The learned recorder told the jury that the girl was of an age to consent to a man having connection with her, and that if they thought she consented to such connection with the defendant, he ought to be acquitted; but that if they were satisfied that she was ignorant of the nature of the defendant's act, and made no resistance, solely from a *bona fide* belief that the defendant was (as he represented) treating her medically, with a view to her cure, his conduct, in point of law, amounted to an assault. The jury found the prisoner guilty, and he was sentenced to be imprisoned for eighteen calendar months, subject to a question for the consideration of this Court whether the conviction was right.

Horne now appeared for the prisoner. The jury find that she has made no resistance, and consented; she permitted, allowed, and assented to the prisoner's act. [*Coleridge, J.* — But the jury find that she did not know the nature of the prisoner's conduct.] Still there was a consent in fact. [*Coleridge, J.* — She consented to the prisoner treating her medically only.] She consented to the prisoner having connection with her. [*Wilde, C. J.* — Suppose the case of a man submitting to a surgical operation under the impression that it was necessary for his cure, but that, in fact, the surgeon performed it with

¹ 19 Law J. Rep. (N. S.) M. C. 174. 14 Jur. 489.

Regina v. Case.

an intent maliciously to injure him, could that man be said to have assented to the bodily injury?] The question of fraud was not put to the jury. It ought to have been put to the jury whether he had committed a fraud upon this young woman — whether he had fraudulently and falsely represented to her that he was about to treat her medically. [Alderson, B. — Do you mean to say that the jury have not, in effect, found fraud?] There is a case of *Reg. v. Reed*, 13 Jur. 68, decided by this Court, which is expressly in point. A girl, nine years old, consented to carnal connection with boys, she, according to the finding of the jury, not knowing what she was about; yet it was held that a conviction for a common assault, under such circumstances, could not be upheld. A consent, in fact, rendered a conviction for an assault impossible, though the prisoners might have been liable for the statutable offence. [Platt, B. — But here the woman does not consent to the pollution of her body. She makes no resistance, from the prisoner's false representation that he is pursuing a course of medical treatment, she being a patient under his care.] She consented to the act. Your Lordship's observation would be equally applicable to the case of *Reg. v. Reed*. There the jury found that the girl did not know what she was about; yet Lord Denman, C. J., ruled that there could be no conviction for an assault. [Alderson, B. — This is exactly like the case of the woman who consented to connection with a man under the belief that he was her husband. The prisoner, in the case to which I refer, obtained possession of the woman's person by a fraud, and the Court held that he was rightly convicted of an assault.] The case of *Rex v. Nichol*, Russ. & R. C. C. 130, was where a master took indecent liberties with a scholar without her consent. In the cases of *Reg. v. Saunders*, 8 Car. & P. 265, and *Reg. v. Williams*, Id. 286, where frauds were practised by the prisoner on a woman, the prisoners were found guilty of an assault. [Alderson, B. — It was held, that assent procured by fraud amounted to dissent. I have a strong impression that in those cases the crime amounted to rape.] If the offence amount to rape, the misdemeanor is merged in the felony. *Sed vide Reg. v. Neale*, 1 Den. C. C. 36. But if every fraud, by which a man obtains possession of a woman, be held to justify a conviction in a Criminal Court, cases of seduction, which have hitherto been considered as belonging to the province of the Civil Courts, will be constituted crimes.

Barrow, for the Crown, was not called upon.

WILDE, C. J. I entertain no doubt whatever in this case. To my mind, it is perfectly clear that the prisoner has been properly convicted. The learned recorder told the jury that the girl was of an age to consent, and that if they thought she had consented to what the prisoner had done, they ought to acquit the prisoner; but that if they were of opinion that she was ignorant of the nature of the prisoner's act, and made no resistance, solely from the belief that she was submitting to medical treatment, they ought to find him guilty. That was a most proper direction, and the jury have found that the prisoner was guilty,

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and that the girl made no resistance, because she supposed he was, as he represented to her, treating her medically. She was, according to the evidence, but fourteen years old; and it is quite reasonable to suppose, that in this case this young person might have been totally ignorant of the nature of the act of the prisoner, and how it would affect her character, her station, and her happiness for the rest of her life. She consented to be medically treated by the medical man, under whose care she had been placed by her parents. Was the defilement of her person medical treatment? Did the prisoner commit no legal, no moral, and no ecclesiastical offence? To contend that a medical man could be justified in such conduct, under any conceivable circumstance, is not to be tolerated in a Court of justice. Here the young woman did not resist, in consequence of the misrepresentation of the prisoner. It was a most wicked act on the part of the defendant; and I am of opinion that the verdict of the jury was perfectly right.

ALDERSON, B. I am of the same opinion. In the case where a man obtains possession of a woman's person by a fraud, the man is clearly guilty of an assault — perhaps of a rape — but certainly of an assault, which is included in a rape.

PATTESON, J. Mr. Horne has confounded active consent with passive non-resistance.

COLERIDGE, J. The young woman consented only to medical treatment. From the confidence which she reposed in the prisoner — which confidence he so much abused — she made no resistance; but as the prisoner obtained his purpose by fraud, he was guilty of an assault.

PLATT, B. There is a great distinction between active consent and passive non-resistance. The young woman consented to medical treatment, and not to what the prisoner had done. — *Conviction affirmed.*¹

¹ In *Hays v. The People*, 1 Hill, 351, where the prisoner decoyed a female under ten years of age into a building for the purpose of ravishing her, and was there detected while standing within a few feet of her in a state of indecent exposure, it was held, that although there was no evi-

dence of his having actually touched her, he was properly convicted of an assault with intent to commit a rape; and it was also held, that the consent of a female of *that age*, or even her aiding the prisoner's attempt, was no defence.

Regina v. Hawkins.

[*Before WILDE, C. J., PATTESON, J., ALDERSON, B., COLERIDGE, J., and PLATT, B.*]

REGINA v. HAWKINS.¹

June 1, 1850.

Embezzlement — Larceny.

The prisoner, having been entrusted by his master with a number of articles of soldiers' clothing, for the purpose of selling them, and ten pounds in silver, to enable him to give change, sailed in a ship for the coast of Africa, having, before his departure, written to his master, to say that he would send the account, together with a remittance, from Madeira:—

Held, that on these facts he could not be convicted of embezzlement, having received the goods from his master himself, and not from another for and on account of his master; but that he might have been convicted of larceny.

THE prisoner was tried at the Sessions of the borough of Saltash, on an indictment containing three counts. The first charged him with having embezzled one handkerchief, one shirt, and one pair of trousers, the property of his master; the second with having embezzled the sum of 10*l.*, also the property of his master; the third count charged him with having stolen the same. The prisoner had been a clerk of the prosecutor, who was a navy and army tailor living at Portsmouth, and it was part of his duty to go on board ships and take orders for and sell clothes to the Marine Artillery, on account of his master. A short time before the prosecution the prisoner had been thus employed on board the *Terrible*, at Portsmouth, which ship being ordered round to Plymouth, the prisoner obtained a passage and came round in her, being first intrusted by his master with a quantity of soldiers' clothes, and 10*l.* in silver, to enable him to give change to his customers. Whilst at Plymouth, he wrote a letter to his master, saying that he could do no business with the marines of the *Gladiator*, a ship lying there, and upon this received a further supply of goods. Not having made any remittance, and having staid away much longer than was reasonable, the prosecutor instituted inquiries, when it was found that the prisoner had entered as a seaman in the *Gladiator*, and had sailed in her to the coast of Africa. Previously to the vessel sailing, the prisoner wrote to his master, saying that he would get all his accounts made up, and remit the money due from Madeira, through Mr. Steel, the lieutenant of marines; but it appeared he had never mentioned the subject to him. The *Gladiator* was driven back to Plymouth by stress of weather, and the prisoner was immediately apprehended; but neither before nor at the time was he asked for any account, nor did it appear that he had ever refused to account, except by going to sea, which, it was contended for the prosecution, amounted to a refusal. There was no evidence to show that the prisoner had received money from any persons to whom he had sold the goods of

¹ 1 Den. C. C. R. 584. 14 Jur. 513.

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his master, except a memorandum, a copy of which is annexed,¹ which was found in his possession; but all the goods he had been supplied with were gone, except a few, of which the handkerchief and other articles mentioned in the indictment were a part, and these goods were found in the prisoner's berth on board the *Gladiator*. Upon these facts, it was contended, on the part of the prisoner, that inasmuch as he had received these goods from his master, and not from any other person on his account, and also had not refused to account, he could not be charged with an embezzlement of them under the statute. For the prosecution, it was contended, that there was evidence to go to the jury as to the embezzlement both of money and goods; but, beyond all question, that it was quite clear that the jury must find the prisoner guilty under the count for simple larceny. The jury found the prisoner guilty on the first count only, charging an embezzlement; and the learned recorder reserved the question for the Judges, whether the prisoner was rightly convicted.

Cox now appeared for the prisoner, and stated the foregoing facts to the Court. [*Patteson, J.*—How can this be embezzlement, when the case finds that the prisoner received the articles from the master?]

Collier, on the part of prosecution, was called on by the Court to show how, under such circumstances, a conviction for embezzlement could be sustained. *Reg. v. Orlando Masters*, 12 Jur. 942. *Reg. v. Whittingham*, Leach's C. C. [*Alderson, B.*—Why was not there a conviction for larceny?] There was evidence of larceny, but the jury found the prisoner guilty of embezzlement, and not of larceny. [*Alderson, B.*—There is no evidence of embezzlement: it is a pity they did not find him guilty of larceny.]

WILDE, C. J. This is the case of a servant receiving articles, not for and on account of his master from another, but *from his master*, to sell, which articles he misappropriates. The facts do not amount in law to embezzlement. — *Conviction quashed.*

¹ Cr.	Terrible account,	.	.	.	.	.	.	.	£7	18	10
	“	“	.	.	.	.	.	.	1	19	0
	Gladiator,	.	.	.	.	.	.	.	3	13	6
	“	.	.	.	.	.	.	.	0	3	0
									<hr/>		
									£13	14	4
	Cash,	.	.						10	0	0
									<hr/>		
									£23	14	4

Regina v. Mathews.

[Before WILDE, C. J., PATTESON, J., ALDERSON, B., COLERIDGE, J., and PLATT, B.]

REGINA v. MATHEWS.¹

June 1, 1850.

Joint receiving stolen Goods by Husband and Wife.

A conviction against husband and wife, for jointly receiving stolen goods, cannot be sustained as regards the wife.

And if the jury find both guilty, the conviction may be affirmed as to the husband, and reversed as to the wife.

At the Epiphany Sessions for Staffordshire, William Mathews, and Ellen his wife, were charged with having received a quantity of fowls, knowing them to have been stolen. The evidence of the police officer was, that when he went to William Mathews's house, he saw Ellen Mathews, and having found a number of fowls and geese in the house, asked her where they came from. She said that she bought part, and that her husband had bought some; and that her husband was not present when she bought them; also that she bought her part of them from people who came to the house, and that her husband bought his on the previous Wednesday, at Shrewsbury Market. It appeared that another constable subsequently took some fowls identified by the prosecutor, the felonious receiving of which was charged in the indictment, to the place where the prisoner William Mathews was in custody, and having shown them to him, asked him from whom he had them. The prisoner hesitated, and the constable said, "We have got your wife's brother in custody: did you not buy the fowls from him?" The prisoner replied, "I did." The prisoners were found guilty, subject to a case for the opinion of this Court, whether, on this evidence, the conviction could be supported.

Kettle now appeared for the prisoner, and stated the evidence, and the direction of the Chairman of the Sessions. [*Alderson, B.* — There is no evidence on which to convict the wife.] The finding being indivisible, then the husband must be acquitted. [*Wilde, C. J.* — Cannot the jury find that one is guilty, and that the other is not guilty?] The prisoners were found guilty of a joint receiving. [*Platt, B.* — The jury have found that the male prisoner received the goods knowing them to be stolen. Surely the verdict is divisible.] There is no evidence of actual receiving by the prisoner William Mathews; he was not in the house at the time when the fowls were found there. [*Coleridge, J.* — *Prima facie*, what is in my house is in my possession. There was some evidence to go to the jury. When the fowls were shown to the prisoner, he said, "I received them from my brother-in-law."]]

Vaughan, for the Crown, *contra.* — In the case of *Reg. v. Parr*, 2 Moo. & R. 345, it was held, that where A, knowing that goods had

¹ 1 Den. C. C. R. 549. 14 Jur. 513.

Regina v. Coulson & another.

been stolen, directed B, his servant, to receive them into his premises, and B, in pursuance of that direction, afterwards received them in A's absence, B also knowing that they had been stolen, they were held to be indictable jointly. [*Patteson*, J.—If it be a fact that the husband and wife received the fowls jointly, how do you get over that? *Vide* 1 Hale's P. C. 45, 516; 1 Hawk. P. C. c. 1, s. 9; Dalt. c. 157, p. 553; *Reg. v. Archer*, 1 Moo. C. C. 143.]

WILDE, C. J. The Court is of opinion that the conviction against the wife cannot be sustained, but that there was evidence to justify the jury in convicting the husband. — *Conviction quashed as regards Ellen Mathews; affirmed as regards William Mathews.*

[*Before* WILDE, C. J., PATTESON, J., ALDERSON, B., COLERIDGE, J., and PLATT, B.]

REGINA v. COULSON & another.¹

June 1, 1850.

False Pretences — Flash Note — Statement of Instrument in Indictment.

Passing off a flash note as a Bank of England note on a person unable to read, and obtaining from him in exchange for it five pigs, of the value of 3*l.* 17*s.* 6*d.*, and 1*l.* 2*s.* 6*d.* change, is a false pretence within the statute.

Where the setting out of an instrument in an indictment can give no information in the Court, it is unnecessary to set it out.

At the Lincolnshire Sessions, held at Louth, on the 16th April, 1850, Henry Coulson and John Rusting were tried and convicted on an indictment which charged that they unlawfully and falsely pretended to one John Bratley, "that a certain printed paper, then and there produced by him, the said Henry Coulson, and by him offered and given to the said John Bratley in payment for certain pigs, before then agreed to be sold by the said John Bratley to the said Henry Coulson, was a good and valid promissory note for the payment of 5*l.*, by means of which said false pretence the said Henry Coulson and John Rusting did then and there unlawfully obtain from the said John Bratley five pigs, of the value of 3*l.* 17*s.* 6*d.*, &c., and 1*l.* 2*s.* 6*d.*, &c., of the moneys, goods, and chattels of the said John Bratley, with intent," &c. It was proved at the trial that the prisoners acted in concert, and that Coulson offered to the prosecutor, in payment of 3*l.* 17*s.* 6*d.*, for certain pigs agreed to be sold by him to the prisoner Coulson, a printed paper, a copy of which is hereunto annexed, which is commonly called a "flash note," and contains the words and figures following, disposed and arranged so as to have the appearance of a Bank of England note:—

¹ 19 Law J. Rep. (N. S.) M. C. 182. 14 Jur. 557.

Regina v. Coulson & another.

" £5.

Bank of Elegance.

No. 230.

" I (No. 230) promise to pay on demand (No. 230) the sum of five pounds, if I do not sell articles cheaper than any body else in the whole universe.

" January 1, 1850.

For myself & Co.,

" M. CARROLL,

" FIVE.

56 Allison Street, Birmingham."

The prosecutor said to Coulson, who tendered the note, " I think it is not a good one." Rusting took the note, and examined it, and said, " It is a 5*l.* Bank of England note, and will go any where." The prosecutor then took the note, and gave the change, 1*l.* 2*s.* 6*d.*, and delivered up the pigs, which he assisted the prisoners in driving part of the way. The prosecutor said he could only read very badly, and, being requested in Court to read the note, said he could not read it at all. At the request of the prisoners' counsel, the Court reserved the following questions for the consideration of the Court of Criminal Appeal: First, whether the act of passing off printed paper in question as a 5*l.* Bank of England note, in payment for goods, amounted to a false pretence; and, secondly, whether the printed paper should have been set out more fully in the indictment.

Willmore now appeared for the prisoner Coulson. The indictment is defective; there is not a word about the prisoner having " knowingly " passed off the flash note as a Bank of England note. [*Wilde*, C. J.—Is there no allegation that the pretence was false to the knowledge of the prisoner?] None. [*Alderson*, B.—Your argument is, that it is consistent with the indictment, that the prosecutor himself might have been subjected to an indictment for doing what the prisoner did.] This is not like the case where a man says that Mrs. Smith sent him, when he knows that Mrs. Smith never did send him. The prisoner might himself have been deceived—he might have supposed that the paper was a genuine note. Alderson, B., has defined a false pretence to be a false representation of a circumstance as an existing fact, when the person who makes the pretence knows at the time that it is not so. In the case of *Reg. v. Wickham*, 10 Ad. & El. 34; s. c. 8 Law J. Rep. (n. s.) M. C. 87, where the indictment stated that the defendant falsely pretended to A B that he was a captain in the East India Company's service, and that a certain promissory note which he then delivered to A B was a valuable security for 2*l.*, by means of which false pretences he fraudulently obtained from A B 8*l.* 15*s.*, whereas the defendant was not a captain, &c., and the note was not a valuable security, &c., it was held to be error; that as it did not appear that the note was the defendant's own promissory note, or that he *knew* it to be worthless, there was no sufficient false pretence in that respect; and as the two pretences were to be taken together, that the indictment was bad. *Reg. v. Philpotts*, 1 Car. & K. 112; *Rex Munos*, 2 Str. 1129. The instrument ought to have been set out in the indictment. [*Alderson*, B.—If you say that a thing is an order for the delivery of goods or

Regina v. Moorhouse James.

money, it is set out in the indictment in order that the Court may judge as to its character; but what is the use of setting out a note of this kind, which can give the Court no information?] It is held to be necessary in works of authority. 1 Stark. Crim. Pl. 94.

Boden, for the Crown, was stopped by the Court.

WILDE, C. J. Where the setting out the instrument in the indictment cannot afford the Court information, it is unnecessary that it should be set out. Here it is alleged, that a certain printed piece of paper was unlawfully and falsely represented by the prisoner to be a good and valid promissory note, whereas it was not so. It appears to me, that all the cases show, that where the instrument has been required to be set out in the indictment, something has turned on the construction of the paper. That is not the case here, and I am of opinion that the conviction was a proper one.

PATTESON, J., ALDERSON, B., COLERIDGE, J., and PLATT, B., concurred. — *Conviction affirmed.*

[*Before WILDE, C. J., ALDERSON, B., COLERIDGE, J., and PLATT, B.*]

REGINA v. MOORHOUSE JAMES,¹ Clerk.

June 1, 1850.

Refusal of a Clergyman to marry Parties who had not been confirmed — Tender of Parties to be married — Averment that the Parties could lawfully be united in Matrimony.

Where a man and woman, notice of whose intended marriage had been published at the Board of Guardians, called at the private house of the clergyman of a chapel in the district, at nine o'clock in the evening, and, showing him the superintendent registrar's certificate, requested him to appoint a time for their marriage, when the clergyman declared he would marry them when they had expressed a desire to be confirmed, and not till then:—

Held, that this was no proper tender of the parties for marriage, nor a legal demand of marriage, and the clergyman was not liable to an indictment for his refusal at such time and place.

The indictment should have shown that the man and woman were parties who might lawfully have been married.

Quære, Is a clergyman justified in refusing to marry parties who have not received the sacrament, nor have expressed a desire to be confirmed?

THE defendant, who was a clerk and officiating minister at St. Thomas's Church, Bedford, in the County of Lancaster, was tried, before Alderson, B., at the Spring Assizes at Liverpool, on an indictment for an offence against the Marriage Act, 6 & 7 Will. 4, in refusing to celebrate a marriage between Henry Fisher and Ann Hardman. The indictment, after reciting the provisions of the act of Parliament, and the certificate of the superintendent registrar of and

¹ 19 Law J. Rep. (N. S.) M. C. 179. 14 Jur. 940.

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for the district of Leigh Union, in the said county, in conformity with it, proceeded: "And the jurors, &c., do further present, that afterwards, and after the issuing of the said certificate by the said John Heyes, as such superintendent registrar as aforesaid, and while the said certificate was in full force and effect, to wit, on, &c., at, &c., they, the said Henry Fisher and Ann Hardman, did produce and show the said certificate to the said Moorhouse James, as being such officiating minister of and at the said church, to solemnize a marriage between them, the said Henry Fisher and Ann Hardman, at the said church, on or before the 14th August then instant, (the said 14th August being the day on which the said notice and certificate, and all proceedings thereupon, would, under and by virtue of the said act of Parliament, become and be utterly void if the said marriage were not had and solemnized on or before the said last-mentioned day.) And the jurors, &c., do further present, that the said Moorhouse James, so being such officiating minister of and at the said church as aforesaid, not regarding his duty in that behalf, nor the statute in such case made and provided, heretofore, to wit, on, &c., at, &c., unlawfully and wrongfully did refuse and neglect, although the said Moorhouse James was so thereunto required as aforesaid, to solemnize a marriage between the said Henry Fisher and Ann Hardman at the said church, and he, the said Moorhouse James, hath always continually, from the time when the said certificate was produced and shown to him, the said Moorhouse James, as aforesaid, and he, the said Moorhouse James, was so thereunto required as aforesaid, to the time of the taking of this inquisition, unlawfully and wrongfully refused and neglected, and still doth unlawfully and wrongfully neglect and refuse, contrary to the duty of him, the said Moorhouse James, in that behalf, contrary to the form of the statute," &c. &c. The superintendent registrar for Leigh, who was also clerk to the board of guardians for that union, proved, that on the 14th May, 1849, a notice of marriage, in the form required by the statute, was delivered to him by Henry Fisher. This notice was duly read on three consecutive weekly meetings at the board of guardians for the union in which Leigh was situated, and duly entered in the registrar's book. At the end of that period, a certificate for the celebration of marriage at St. Thomas's Church, Bedford, in the proper form, was granted by the superintendent registrar. With this certificate, Henry Fisher (who, as well as Ann Hardman, had for a month and upwards before the first notice resided within the district) called on the defendant, who was the officiating minister of St. Thomas's Church, a district church in the parish of Leigh, on the 13th June, 1849. Fisher's evidence was as follows: "I told him I was come to give notice I intended to be married next morning at St. Thomas's. He asked me if I had been baptized. I said, 'Yes.' He asked what was my name. I told him. He asked if I had been asked in church. I said, 'No.' He asked where I had been asked. I said, 'At the board of guardians.' He asked me if I had been confirmed. I said, 'No.' He said he could have nothing to do with me then. I said, 'Why?' He said he was not obliged to tell me his reason. I said, 'Very well;

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I will go to the board of guardians, and see what they say.' He said, 'If people will be so foolish as to go to the board of guardians to be asked, the board of guardians must marry them.'" The superintendent registrar also gave the following evidence: "On the 19th June I called on defendant. He is officiating minister of St. Thomas's Church, Bedford, in Leigh district. I saw him in company with Fisher. I told him my name and office. I said I had corresponded with the registrar general about it, in consequence of his refusal to marry the parties. I said the registrar general did not consider confirmation a prerequisite or any legal impediment to the marriage. Defendant said he had seen Fisher before, and declined to say any thing. I said, 'Then Fisher has something to say.' Fisher put his hand into his pocket, and was about to address defendant, who refused to hear him. The defendant retired, and closed the door of his residence. I went again on the 2d August, with Fisher, Hardman, and a solicitor. Whitehead saw defendant. Whitehead said, 'We are come about a marriage, and are wishful that an arrangement could be made by which the parties could be married on a certificate.' Fisher produced it. Defendant said he supposed it was all right, according to law. Fisher desired him to fix a time for marriage on or before the 14th August. Hardman made a similar demand. Defendant said, 'I will marry him when he (Fisher) has expressed a desire to be confirmed. The parties made no reply. They then repeated the demand. Defendant said, 'I have given you my answer.' It was after nine P. M. when we called." No other evidence was given to alter the facts thus proved. It appeared that St. Thomas's Church was consecrated in 1840, but the act of consecration was not produced in evidence. There was a font in the church, and a burying ground, in which interments had taken place, attached to it; but there was no proof of marriages having been seen to be celebrated there. Mr. Bliss, for the defendant, took various objections. First, that if there was a refusal to marry, and without sufficient reason, it was not an indictable offence, but an offence against ecclesiastical law only. Secondly, the refusal, on the ground that Fisher, one of the parties, had not been confirmed, which was the fact, was justifiable. Thirdly, that there were other reasons, apparent on the facts proved, justifying such refusal; and that the defendant, even though he had refused on one ground only, had full right to avail himself of those objections also. Fourthly, that there was not a sufficient demand and tender of themselves to be married by the parties; no readiness to be married sufficiently proved, nor any consent of parents signified to the defendant, both parties being, as was the fact, minors. Fifthly, that a refusal on the 2d August was not sufficient, the certificate enabling the parties to be married up to the 14th August. Sixthly, that there was no proof of St. Thomas's being a church where marriages were celebrated.

The learned Judge directed, as there was no dispute about the facts, a verdict for the Crown, in order that these points of law might be raised, and his Lordship respited the judgment to the ensuing Assizes.

Bliss (*Badeley* with him) now appeared for the defendant. The defendant was justified in refusing to marry the parties, as there were lawful impediments to the marriage. He was ready to marry them when the parties expressed a desire to be confirmed — when they were in a state of mind which, from the nature of the rite itself, from the formularies of the liturgies, from the rubrics, canons, and from the opinions of divines, was essentially requisite. Marriage is, it is true, no longer a sacrament, but it is “an excellent mystery” — a holy rite, and not merely a contract. A degree of faith and mental fitness in the parties was presupposed. The rubric says, “It is convenient that newly-married persons shall receive the holy communion at the time of marriage, or if not, they shall partake of it on the first opportunity after marriage.” At the end of the rubric respecting confirmation, it is provided that no person shall be admitted to the holy communion till he had received confirmation, or had expressed his desire to be confirmed. If, therefore, it was convenient that the newly married persons should receive the holy communion, and that no one was to receive the holy communion till either he had been confirmed or had expressed a readiness and willingness to be confirmed, it followed that it was considered by the church that persons should be confirmed before they were married. [*Alderson*, B. — How, then, could a Protestant marry a Roman Catholic?] The Church of England recognized the rites of confirmation and holy communion in the Roman Catholic Church. The rubric of Edward VI., 1546, says, “New married persons, the same day of their marriage, must receive the holy communion. In the Prayer-book of 1552, the communion service is introduced into the marriage service. Down to the alteration in the reign of Charles II., it was imperative on parties about to be married to receive the holy communion. The word “convenient” was then substituted, and that seems to imply a degree of fitness. By the canons of 1603, the clergy were required to refuse the holy communion to notorious ill livers; they were also required to do so by the rubric; and it was the duty of the clergy, if a schismatic or an immoral person presented himself, to refuse him the holy communion. Notes on the Common Prayer, by Overall, Andrews, and Cousins; Nicholls’s Commentary on the Common Prayer, p. 60; De Impedimentis Matrimonii; Hooker on Matrimony, vol. 2, p. 433; Jeremy Taylor’s Works, vol. 5, p. 666. [*Platt*, B. — Would it be enough for a man to be desirous of being confirmed?] The defendant put it on that ground. He was ready to marry the parties when they expressed a *desire* to be confirmed. The objection to the marriage service by the Puritan divines in the reign of Charles II., and the answers of the bishops to them, are particularly worthy of attention. Cardwell’s History, p. 330. All persons fit to be married ought to be fit to receive the holy communion. Tertullian ad Uxor, lib. 2, c. ult. p. 171; Charge of Wilson, Bishop of Sodor and Man, vol. 1, p. 35; Catc. Grindall, Archbishop of York, Life of Archbishop Sharpe. In order to receive the blessings of the church, parties should comply with the requirements of the church. The new statute, 6 & 7 Will. 4, c. 85, restores the discipline of the church, which was interfered with

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by the previous statute. It enacts that "all rules prescribed by the rubric concerning the solemnizing of marriages shall continue to be duly observed by every person in holy orders of the Church of England, who shall solemnize any marriage in England; provided always, that where, by any law or canon in force before the passing of this act, it is provided that any marriage may be solemnized after publication of banns, such marriage may be solemnized in like manner on production of the registrar's certificate." Here the man and woman had been living together openly in sin; was the church bound to celebrate a marriage under such circumstances, till they exhibited a fit state of mind? Again, the parties were not of age. The canons do not allow a clergyman to marry parties who are minors, without the consent of their parents or guardians. [Alderson, B. — Notice before the board of guardians is, by the statute, equivalent to banns; where banns are published, no consent is necessary. Coleridge, J. — I should be very sorry to have it assumed that parties in the state in which these appear to have been have a right to be married.] The defendant in this case did not raise this question gratuitously; circumstances in his neighborhood rendered it absolutely necessary for him to vindicate a holy rite, and the laws of the church, which were set at defiance. [Coleridge, J. — If a person were to exhibit open profaneness, or to appear at the altar in a state of intoxication, that would be a lawful impediment to the marriage temporarily.] Archbishop Zouch (Johnson's Canon Law) published a constitution on this subject. The church says, "Since, in your present state, you are not worthy of the communion, you are not worthy of holy matrimony. Repentance in your case is necessary." [Wilde, C. J. — Is not marriage, in such a case, the best proof of repentance?] The refusal of the defendant to marry these parties is no offence within the statute; it is, if any, purely an ecclesiastical offence. Again, there was no proper tender by the parties to be married. The tender was made in the defendant's house; it ought to have been made in the church, at canonical hours. [Platt, B. — Is the refusal any thing more than refusing to fix a time? There may have been a *locus penitentia*.] The defendant had up to the 14th to marry them, but they never came to him again. They asked him to make an arrangement for their marriage, but he was not bound to make an arrangement. [Patteson, J. — Unless the defendant's answer dispenses with any further tender.] It is submitted, that no offence has been committed, the parties not having presented themselves, with their witnesses, at the proper time and place. [Platt, B. — The parties were bound to place the defendant in such a predicament as to render it his duty then to marry them. Until the duty attached, how could he be guilty? Alderson, B. — At the utmost, it is only an intimation that at some future time he would violate the law. Wilde, C. J. — A tender must be made at a time when it can be accepted by the party to whom it is made. Patteson, J. There is no absolute refusal to marry, on the face of the case. The defendant says, "I will marry you when you express a desire to be confirmed."] There was no proof that the chapel was licensed. The defendant would have been

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guilty of felony if he had celebrated a marriage in a place which was not licensed; and it is submitted that proof ought to have been given that the chapel was duly licensed. *Davies v. Black*, 6 Jur. 55; 1 Q. B. 900; *Rez v. Richards*, 8 T. R. 634; *Philpotts v. Evans*, 9 Law J. Rep. (N. S.) Exch. 33; 10 Law J. Rep. (N. S.) Q. B. 338; 5 M. & W. 475; *Ripley v. M'Clure*, 18 Law J. Rep. (N. S.) Exch. 419; *Reg. v. Nott*, 1 Car. & M. 288; Co. Litt. 66, a; *Middleton v. Uxor v. Croft*, Str. 1056. There is no averment in the indictment that the parties might lawfully marry. [*Alderson*, B. — From what appears on the indictment, they might have been uterine brother and sister.]

Crompton, (Sir John Jervis, A. G., *Knowles*, and *Milward* with him.) First, the prisoner was properly convicted; secondly, the indictment is sufficient. [*Wilde*, C. J. — Suppose you were to call at the office of the registrar of deeds, and say, "I will come in a month to register a deed, will you register it?" and he should say "No;" would that amount to a tender and refusal?] This is a criminal offence — a contempt of a statute. If the defendant disobeys the statute, it is a crime. The clergyman is bound to make the necessary appointment; the rubric provides that he shall do so. If he wrongfully refuses to marry, he dispenses with further tender. Could the parties go and make a public demand, and create a disturbance in the church? [*Alderson*, B. — How do you get over the difficulty that a tender was made at a time when the marriage could not be celebrated — nine o'clock at night, when, canonically, he could not celebrate a marriage?]

Sir John Jervis, A. G. The object of the prosecution was to take the opinion of the Court whether the administration of the sacrament or confirmation were necessary before marriage. [*Wilde*, C. J. — We can hardly give judgment upon that point.] The circumstances gave rise to a great deal of disturbance and heartburnings, and our object was to allay excited feeling. [*Wilde*, C. J. — We do not think that these points are essential to the decision of the case before us. *Patteson*, J. — Suppose we were to accede to your request, and pronounce an opinion on your question — if banns were published in the church, the refusal would clearly not be an indictable offence. *Alderson*, B. — There was no sufficient tender, and it ought to have appeared that Fisher and Hardman were parties who lawfully could be married.]

WILDE, C. J. — The case has failed on the merits, and the conviction must be quashed. — *Conviction quashed.*

Regina v. Watts.

[Before WILDE, C. J., PATTESON, J., ALDERSON, B., COLERIDGE and CRESSWELL, JJ.]

REGINA v. WATTS.¹

June 8. 1850.

Larceny — Embezzlement — Special Property in Directors of a Company — Shareholder — Servant.

Where a cancelled check, the property of an insurance company, had passed from the hands of the messenger, who received it at the bank, to the prisoner, a clerk in the employment of the company, whose duty it was to keep it for the directors:—

Held, first, that as the check, when it came into his custody, had arrived at its ultimate destination, it was really in the possession of the directors, who had a special property in the check; and therefore that the prisoner, who had unlawfully abstracted it, was guilty of larceny, not of embezzlement.

Secondly, that where the directors of a company have a special property in checks or other articles, the interest of a shareholder in the company gives him no property in it, and that he may be indicted for stealing property from the directors.

THE prisoner was tried before Cresswell, J., at the Central Criminal Court, on the 10th of May, on an indictment, of which the following is an abstract: That Walter Watts, on the 26th February, at St. Mary, Woolnoth, London, was clerk to George Carr Glyn, and whilst he was such clerk feloniously did steal one order for the payment of money, to wit; for the payment and of the value of 1400*l.*, belonging to the said George Carr Glyn, his master. The second count alleged that the said prisoner was clerk to the said George Carr Glyn as, and then and there being, treasurer of the Globe Insurance Company, and that he did steal one order, &c., belonging to the said George Carr Glyn, as such treasurer. The third count alleged that the said prisoner was servant to Edward Goldsmid and others, and that he did steal one order belonging to them, his masters. The fourth count was like the third, only, instead of alleging the order to belong to Goldsmid and others, it alleged it to have been in their possession and power. The fifth and sixth counts, William Tite and others, instead of Goldsmid and others. The seventh and eighth counts, embezzling the order, the property of Glyn. The ninth count, embezzling the order, the property of Goldsmid and others. The tenth count, embezzling 1400*l.*, the property of Goldsmid and others, his masters. The eleventh count, embezzling the order, the property of Tite and others. The twelfth and thirteenth counts, stealing a piece of paper belonging to Glyn, his master. The fourteenth count, stealing a piece of paper, the property of Goldsmid and others, his masters. The fifteenth count, stealing a piece of paper in the possession and power of Goldsmid and others, his masters. The sixteenth count, stealing a piece of paper, the property of Tite and others, his masters. The seventeenth count, stealing a piece of paper in the possession and power of Tite and others, his masters. The eighteenth, nineteenth, twentieth, and twenty-first counts were like the seventh, eighth, ninth,

¹ 19 Law J. Rep. (N. S.) M. C. 192. 14 Jur. 870.

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and eleventh, only embezzling a piece of paper, instead of embezzling the order. The twenty-second, twenty-third, twenty-fourth, and twenty-fifth, stealing an order for the payment of money, the property of the said persons, without alleging the prisoner to be a servant. The twenty-sixth, twenty-seventh, twenty-eighth, and twenty-ninth, stealing a piece of paper, the property of the said persons, without alleging the prisoner to be a servant.

It appeared that the prisoner had, for many years, been employed as a salaried clerk in the office of the Globe Insurance Company, and that he was a shareholder in the concern. The affairs of the company, which is an unincorporated copartnership, are managed by a body of directors chosen out of the shareholders, and at the time when the alleged offence was committed Edward Goldsmid was chairman, and William Tite deputy chairman of the directors, and George Carr Glyn was treasurer. The directors appoint and dismiss clerks and other servants, and fix their salaries and the particular duty to be discharged by them, and the directors have the charge and custody of all books and papers belonging to the company. The salaries of the clerks are paid out of the funds of the company. The company had a drawing account at the bank of Glyn & Co., and were in the habit of sending their pass-book on Tuesday in every week to be written up, and their messenger went on the following morning to bring it back, when it was returned, together with the checks and bills paid during the preceding week. The prisoner was the person whose duty it was to receive the pass-book and vouchers from the messenger, and it was his duty, upon receiving them, to compare the entries in the pass-book with the books of the company, and to preserve the vouchers for the use of the company, if wanted on any future occasion. On the 26th February the prisoner paid into the London and Westminster Bank, for his own account, which he kept there, a check for 1400*l.*, purporting to be drawn by the Globe Insurance Company on Glyn & Co. It was cashed by Glyn & Co., together with other checks, for the London and Westminster Bank, entered to the debit of the Globe Insurance Company in their pass-book, and delivered, together with the book, on the following Wednesday, to the messenger of the company, who delivered the book and check to the prisoner in the usual way. On the 4th March, in consequence of some suspicion attaching to the prisoner, a search for the check of 1400*l.* was made during his absence amongst the vouchers in his keeping, and it could not be found. His papers were then sealed up, and he, on finding such a step was taken, said he would not remain there, and quitted the office. The pass-book was examined, and there the entry of the check for 1400*l.* had been erased; and the check was never found. There was no evidence to show that any person on behalf of the company had ever drawn the check in question, or that it had been drawn upon paper stolen from the company. Upon this state of facts it was contended by the prisoner's counsel, that there was no evidence of any property in any of the parties from whom the check was alleged to be stolen, except as shareholders, and that the prisoner, being also a shareholder, could not be indicted for stealing the property of which

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he was a joint owner: that the stat. 47 Geo. 3, c. 30,—whereby it was enacted, “that all actions and suits to be commenced or instituted by or on behalf of the said society or partnership, against any person or persons, or body or bodies politic or corporate, shall or lawfully may be commenced, or instituted, or prosecuted, in the name or names of the treasurer or treasurers, for the time being, of the said society or partnership, as the nominal plaintiff or plaintiffs for and on behalf of the said society or partnership; and that all prosecutions to be brought or instituted, by or on behalf of the society or partnership, for fraud upon or against, or for embezzlement, robbery of, or stealing the property of the said society or partnership, or for any other offence committed against or with intent to injure or defraud the said society or partnership, shall or lawfully may be so brought or instituted and carried on, in the name or names of the treasurer or treasurers, for the time being, of the said society or partnership; and in all indictments and informations it shall be lawful to state the property of the said society or partnership to be the property of the treasurer or treasurers for the time being of the said society or partnership; and any offence committed with intent to injure or defraud the said society or partnership shall and lawfully may, in such prosecution, be laid to have been committed with intent to injure or defraud the said treasurer or treasurers for the time being of the said society or partnership, and any offender or offenders may be thereupon lawfully convicted of such offence; and the death, resignation, or removal, or other act of such treasurer or treasurers, shall not abate any such action, suit, or prosecution,”—made the treasurer the representative of all the shareholders, and therefore of the prisoner as well as others, and did not alter the case. The learned Judge thought that the charge of embezzlement and of stealing an order for the payment of money failed; but, in order to obtain the opinion of the Court with regard to the charge of stealing a piece of paper, he told the jury, that if the cancelled check was returned to the prisoner, and he received it in the usual manner, to be kept by him for the use of the directors, and afterwards abstracted or destroyed it, they should find him guilty. The jury found him guilty of stealing a piece of paper, and Cresswell, J., requested the opinion of this Court whether his direction was right or not.

Sir John Jervis, Attorney General, Sir John Bailey, Clarkson, and Bovill appeared for the Crown.

Cockburn, *Bramwell*, and *Bodkin* appeared for the prisoner. In the first place, this is not a case of larceny, but, if any thing, a case of embezzlement; upon this ground, that the piece of paper never came into the possession of the masters at all. The course of business was, that the messenger should receive the pass-book and check from Glyn's bank, and deliver it to the prisoner. The check never got into the hands of the masters. It was delivered to one servant, and was by him handed to another. In the case of *Reg. v. Masters*, 1 Den. C. C. 332; 12 Jur. 942, the money had never got into the hands of the master,—it was in the course of passage to the master; and

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that was held to be embezzlement, not larceny. The facts here are the same. If the messenger had appropriated the check to his own use, he would have been guilty of embezzlement. [Wilde, C. J.—The case of *Reg. v. Masters* is distinguishable from *Rex v. Murray*. Coleridge, J.—If the prisoner places the check in a proper place of deposit, and afterwards takes it away, and converts it to his own use, is it not larceny?] It does not appear that there was any specific place of deposit, or that he even took it out of its proper place of custody. [Coleridge, J.—Suppose I send my footman to a silversmith for some plate; the footman brings it, and delivers it to the butler; the butler puts it into the plate-chest, and steals it; would that be embezzlement or larceny?] Embezzlement; but the present case falls far short of the case supposed. The prisoner was merely to keep the check as a voucher, to be produced when wanted. If he had a right to keep it in his pocket, at his abode, or any where he liked, then the offence could not be larceny. The principle of *Rex v. Murray*, 1 Moo. C. C. 276; 5 Car. & P. 145, differs from the present case; there the money proceeded in the first instance from the master. [Alderson, B.—You say that in *Reg. v. Masters* the money was in its progress to the master, and that in the case of *Rex v. Murray* the money was in its progress from the master.] There is no evidence that it was a genuine check, drawn by the company, or drawn upon paper stolen from the company. On the second point, it is submitted that the prisoner could not be convicted of larceny, as he was himself a shareholder in the company. It is true, he was a servant of the company; but the company consisted of a vast number of shareholders; the act of Parliament constituting the company provides for all the common incidents of partnership; the prisoner was a shareholder, and therefore a partner. It could not be said that he could be convicted of a larceny of his own property. There are cases where it has been held to be larceny for a man to take his own property *animo furandi* from a person who has a special property in the article, with a present right of possession. But here the prisoner has the present right of possession, for he was to keep it till called on to produce it. He has property, possession, and present right of possession; and there are no cases to show that in such circumstances a person could be convicted of larceny. 2 Russ. Cr. 87. The prisoner was described as a servant of the treasurer and directors, but, in fact, he was a partner, acting under others who were partners with him.

Sir J. Jervis, A. G., for the Crown. The objections to the conviction are, first, that this is a case of embezzlement, not larceny; secondly, that the prisoner was a partner, and therefore could not be guilty of larceny; thirdly, that he was not a servant. The cancelled check was returned to the prisoner, and was received by him to be kept for the use of the directors. The check was not *in transitu*, as in the case of *Reg. v. Masters*. It had reached its ultimate destination before it was stolen. If I send my clerk to Butterworth's or Sweet's, the booksellers, and the bookseller gives him a book for me, and then the clerk gives it to the laundress at the chambers, and she steals it, that would clearly

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be larceny. [*Patteson, J.* — You say that you would have had possession of the book in the possession of the laundress?] Yes. In the present case the receipt of the cancelled check by the messenger was a receipt by the company. *Rex v. Murray*. [*Cresswell, J.* — In the case of *Reg. v. Masters* the first servant had not received the money with a duty to hand it to the master; it was his duty to hand it to another, and he was not bound to hand over the same specific coin.] The case of *Rex v. Murray* is clearly distinguishable from *Reg. v. Masters*. When the bankers delivered the check to the porter of the company, it became their property, and to steal it from the possession of the company was larceny. A man may be servant of a company of which he is a member, and may be indicted for stealing the property of the directors. *Rex v. Hall*, 1 Moo. C. C. 474. What is there to prevent the prisoner from being liable to a prosecution? The directors have the general management, they have a special authority to manage the property, they have the custody of the books and papers, they appoint and dismiss servants, and are in the position of trustees; they therefore had a special property in the check. *Rex v. Jensen*, 1 Moo. 434; *Reg. v. Muller*, 2 Moo. 249. A member of a club was held guilty of larceny, in stealing some plate, the property of the club, and the property was laid in the steward. It is, lastly, denied that the prisoner was the servant of the company. That point does not arise on the case; but a man may clearly be a servant of a company in which he is a shareholder. [*Wilde, C. J.* — Who could he sue for his salary?] Those who employed him. [*Wilde, C. J.* — Suppose the funds fall short, where are the funds to come from?] The case finds, as a fact, that the prisoner was employed as a salaried clerk by the company.

Cockburn replied. — *Cur. adv. vult.*

WILDE, C. J., pronounced the judgment of the Court. We have considered the case, and are all of opinion that the counts in the indictment which charge the stealing a piece of paper, the property of Goldsmid and others, the masters of the prisoner, are supported by the evidence. By the statement of the case, it appears that Goldsmid and others are the directors of the company, and that by its constitution they have the appointment and dismissal of the servants in the employ of the society; that they fix and pay their salaries, and also fix the duties they are to perform. The prisoner was a salaried clerk in the office, and therefore he was their servant. They have also the ultimate charge and custody of the documents of the company, and, by the course of business between the company and its bankers, the paid checks were returned to the directors, were part of the company's documents, and became the vouchers of the directors, and their property as such directors. The paper in question was one of these. One of the prisoner's appointed duties was to receive and keep for his employers such returned checks; any such paper, therefore, in his custody, would be in the possession of his employers. The paper in question, therefore, as soon as it had passed from the hands of the

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messenger and arrived at its ultimate destination, the custody of the prisoner, for the directors, was really in their possession, and when he afterwards abstracted it for a fraudulent purpose, he was guilty of stealing it from them; as a butler, who has the keeping of his master's plate, would be guilty of larceny, if he should receive plate from the silversmith, for his master, at his master's house, and afterwards fraudulently convert it to his own use, before he had, in any other way than by his act of receiving, come to the actual possession of the master. This case is distinguishable from those in which the goods have only been in the course of passing towards the master, as in *Reg. v. Masters*, 18 Law J. Rep. (N. S.) M. C. 2, where the prisoner's duty was only to receive the money from one fellow-servant and pass it on to another, who was the ultimate accountant to the master. Here the paper had reached its ultimate destination when it came to the prisoner's keeping, and that keeping being for his masters, made his possession theirs. In this view of the case no difficulty arises as to part ownership, from the fact that the prisoner was a shareholder in the company. As such, he had no property in this paper. — *Conviction affirmed.*

[Before POLLOCK, C. B., WIGHTMAN, J., WILLIAMS, J., TALFOURD J., and MARTIN, B.]

REGINA v. CRADDOCK.¹

November 22, 1850.

Indictment — Counts for felonious receiving.

An indictment, in the first count, charged the prisoner with larceny, on which the jury found a verdict of not guilty; in a subsequent count, the prisoner was charged with having received the article "so as aforesaid feloniously stolen," on which the jury found a verdict of guilty: —

Held, that there was no repugnancy, for that, although the word "aforesaid" in a subsequent count virtually incorporates all the necessary averments as to time and place in that count, the words "so as aforesaid feloniously stolen" did not necessarily mean that the article had been stolen by the person named in the first count, but only that it had before then been feloniously stolen by *some person*.

A verdict of not guilty can be entered on one count, and of guilty on another.

THE prisoner was indicted at the General Quarter Sessions for the County of Northumberland, held at Hexham, on the 3d July last, upon an indictment consisting of three counts. The first count charged a stealing of a promissory note for 10*l.* from the person, in the common form; the second charged a stealing of a bank-note from the person. The third count was as follows: "And the jurors aforesaid, upon their oath aforesaid, do further present, that Henry Craddock, late of the parish aforesaid, in the county aforesaid, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, the goods and

¹ 20 Law J. Rep. (N. S.) M. C. 31. 14 Jur. 1031.

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chattels aforesaid, so as aforesaid feloniously stolen, taken, and carried away, feloniously did receive and have, then and there, well knowing the said goods and chattels last aforesaid to have been feloniously stolen," &c. The jury found the prisoner not guilty upon the first and second counts, but guilty of receiving upon the third count. Upon this, the counsel for the prisoner moved in arrest of judgment, because the jury had acquitted the prisoner of the stealing; and in the last count of the indictment it was stated that the prisoner did receive the same goods and chattels, "so as aforesaid feloniously stolen:" whereas, the jury having found that he had not stolen the same, they could not, under the third count, find him guilty of receiving the goods so alleged to be stolen by him. The counsel for the prosecution contended that the words "so as aforesaid" might be struck out as surplusage; but the Court refused to strike them out, and reserved the question for the consideration of this Court, whether the prisoner was properly found guilty of receiving on the third count of the indictment.

Otter now appeared for the prisoner. The words "so as aforesaid feloniously stolen" clearly meant that the note had been received by him, the said Henry Craddock, after it had been stolen by the same Henry Craddock; but the jury had found that he was not guilty of stealing it. The indictment could not at the same moment say that the prisoner was *not* guilty of stealing, and that he *was* guilty. The recent stat. of 11 & 12 Vict. c. 46, might be relied upon by the prosecution; but that statute only enabled the prosecutor to add a count for felonious receiving in an indictment for larceny, but it made no alteration in the technical rules of criminal pleading. The case of *Rex v. Woolford*, 1 Moo. & R. 384, was in point. If it were stated who was the principal felon, it was necessary that the fact should be proved as laid. In the case of *Rex v. Galloway*, 1 Moo. C. C. 234, which was before the late statute, the whole of the Judges agreed in directing that charges of stealing and receiving should not be inserted in the same indictment. [*Wightman, J.* — Do the words "so as aforesaid feloniously stolen" necessarily mean stolen by the same person named in the previous count? If they are capable of another construction, the Court will construe them so as not to make them repugnant.] It is contended, that the words "so as aforesaid" draw down into the third count the name of the man himself; and as he is acquitted on the first count, it is repugnant to say in the third count that he received the note after having previously stolen it. [*Pollock, C. B.* — If one count of the indictment be good, the other cannot vitiate it.] But the third count cannot stand alone; it begins, "The jurors aforesaid, upon their oath aforesaid, do further present, that Henry Craddock, late of the parish aforesaid, in the county aforesaid, on the day and year aforesaid, at the parish aforesaid," &c. [*Pollock, C. B.* — No; these words have the same effect as if the date, parish, and county were incorporated in the third count.] Still there is a repugnancy; for the first and second counts say he is not guilty, and the last says he is guilty of larceny. [*Martin, B.* — Suppose there

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were two counts in an indictment precisely the same — for stealing a watch — could not there be a verdict of guilty entered on one count, and not guilty on the other? There would be repugnancy in that case, too. [Pollock, C. B. — Your objection being purely a technical one, you must be able to place it beyond any technical answer. Though the first and second counts said “not guilty,” there might be a conviction on the third, and it might mean that the prisoner received the note, having himself previously stolen it.] The words “so as aforesaid feloniously stolen,” cannot be struck out. The count would be defective without them. The facts on the trial — [Pollock, C. B. — We cannot here take the facts from any counsel, however respectable. We know nothing of them except what are stated on the face of the case. The conviction on the third count is sufficient.] Then your Lordships overrule the case of *Rex v. Woolford*. [Pollock, C. B. — No; that case was before verdict. The only question here is, Is the judgment to be arrested? That is a dry question of special pleading. Williams, J. — What is the objection to saying, “I said in the first and second counts that the prisoner, Henry Craddock, stole the note,” and in the third to add, “I say again that he stole it, and afterwards received it?” Wightman, J. — The words “so as aforesaid” do not necessarily mean that the note was stolen by the said Henry Craddock; they only mean that it had before then been feloniously stolen by some one.]

POLLOCK, C. B. We are all of opinion that the conviction, on the last count, is good, and that the judgment ought not to be arrested. Some of the Court think that the words “so as aforesaid” do not import into that count the words “stolen by Henry Craddock.” The others hold that, supposing these words be imported, the finding on that count is nevertheless perfectly valid. — *Conviction affirmed*.¹

¹ Counts for stealing and receiving stolen goods may well be joined in the same indictment, and the Court will neither quash the indictment, nor compel the prosecutor to elect upon which count he will proceed. *Hampton v. State*, 8 Humphrey, 69. Not only may a verdict of guilty be rendered on one count, and not guilty upon another, but if the jury find the defendant

guilty on one count, and say nothing in their verdict concerning other counts, it will be equivalent to a verdict of not guilty on such counts. *Weinzorpfen v. The State*, 7 Blackford, 186. *Morris v. The State*, 8 Smedes & Marshall, 762. *Commonwealth v. Bennett*, 2 Virginia Cases, 235. *Kirk v. Commonwealth*, 9 Leigh, 627. *Stoltz v. People*, 4 Scammon, 168.

Regina v. Dadson.

[Before POLLOCK, C. B., WIGHTMAN, J., WILLIAMS, J., TALFOURD, J., and MARTIN, B.]

REGINA v. DADSON.¹

November 26, 1850.

Arrest — Shooting at a Felon — Indictment against a Constable.

A constable, who was employed to guard a copse from which wood had been stolen, and who for this purpose carried a loaded gun, saw a man come out of the copse carrying some wood; the constable called to him to stop, but instead of doing so the man ran away, whereupon the constable fired and wounded him in the leg. The constable was afterwards indicted for shooting at the man with intent to do grievous bodily harm; and on the trial it was proved that the stealing of the wood by the man who had been wounded amounted to felony:—

Held, that the constable was properly convicted of shooting with intent to do grievous bodily harm, as, at the time he fired, the fact that a felony had been committed was unknown to him.

THE prisoner was tried, before Erle, J., at the last Kent Summer Assizes, on an indictment for shooting at William Waters, with intent to do him grievous bodily harm. It appeared that he, being a constable, was employed to guard a copse from which wood had been stolen, and, for this purpose, carried a loaded gun. From this copse he saw the prosecutor come out, carrying wood, which he was stealing, and called to him to stop. The prosecutor ran away, and the prisoner, having no other means of bringing him to justice, fired and wounded him in the leg. These were the facts on which the prisoner acted. It was alleged, in addition, that Waters was actually committing a felony, he having been before convicted repeatedly of stealing wood, but these convictions were unknown to the prisoner; nor was there any reason for supposing that he knew the difference between rules of law relating to felony and those relating to less offences. The learned Judge told the jury that shooting with intent to wound amounted to the felony charged, unless from other facts there was a justification; and that neither the belief of the prisoner that it was his duty to fire, if he could not otherwise apprehend the prosecutor, nor the alleged felony, it being unknown to him, constituted such justification. Upon this the prisoner was convicted of felony, and let out on his recognizance to come up for judgment, if required. The case was not argued by counsel.

POLLOCK, C. B., said that the Court were of opinion that the prisoner had been properly convicted, as it was found that he was not aware that a felony had been committed at the time he fired at the prosecutor. — *Conviction affirmed.*²

¹ 20 Law J. Rep. (N. S.) M. C. 57. 14 Jur. 1051.

² This decision proceeded on the ground that the constable *was not aware*, at the time of firing at Waters, that he had committed any more than an offence punishable summarily under the 7 & 8 Geo. 4, c. 29, s. 30: it seems to follow, that if the constable had known that a felony had been committed, he would, under the circum-

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[In the Exchequer Chamber, before LORD CAMPBELL, C. J., PARKE, B., PATTESON, J., ALDERSON, B., COLERIDGE, J., CRESSWELL, J., MAULE, J., ERLE, J., PLATT, B., TALFOURD, J., WILLIAMS, J., and MARTIN, B.]

REGINA v. WILEY.¹

November 26, 1850.

Receiving stolen Goods — What amounts to a Receipt — Manual and constructive Possession.

A, B, and C were jointly indicted for stealing and receiving some fowls. It was proved that A, carrying a sack containing stolen fowls, went with B, at past four in the morning, into the house of C's father; that in about ten minutes time A (still carrying the sack) came out at the back door with B, preceded by C with a lighted candle; that C was the only member of the family up in the house; that the three went together into a stable on the same premises; that the police went into the stable after them, and found the sack lying on the floor, and the three men standing round it as if bargaining. The Bench told the jury, that the taking of A and B with the stolen goods by C into the stable over which he had the control, for the purpose of negotiating about the buying of them, he well knowing the goods to have been stolen, was a receiving them within the meaning of the statute. The jury convicted A and B of stealing the fowls, and C of receiving the fowls, knowing them to have been stolen.

Upon a case, stating the above facts, the question asked being whether the conviction of C was proper:—

Held, by a majority of the judges, (eight to four,) that the conviction was wrong.

The majority were of opinion that C did not receive the fowls, as they all along remained in the manual possession of A and B, and were never under C's control, and it was not the intention of A and B that C should have them, except on the contingency, which never happened, of his completing a bargain for them.

The minority held, that as C coöperated with A and B in the common purpose of carrying the fowls into the stable, he had a joint possession with them, and that as he knew that the fowls were stolen, and assisted in the removing them for the purpose of negotiating about the purchase, he had a possession with a wicked purpose, and therefore might properly be convicted as a receiver.

THE opinion of the Judges was requested on the following case:—

At the General Quarter Sessions of the Peace for the County of Northumberland, holden by adjournment at the Moot Hall of the

stances, have been held justifiable; and if justifiable in firing, that he would have been justifiable had death ensued. It is laid down by Lord Coke, 3 Inst. 221, "But it was no question at the common law, that if a robbery, murder, burglary, or other felony was done, and pursuit made after the offender, who, either by resistance or flight, could not be apprehended without killing him by inevitable necessity, the party so pursuing and killing should not forfeit his goods and chattels." Also, according to Foster, (p. 271,) it is justifiable homicide if a felony is committed or a dangerous wound is given, and the felon flies and cannot otherwise be taken, and is killed. The same Lord Hale observes, (Sum. P. C. 36,) "If any person that pursues upon hue and cry, or otherwise to arrest a felon that flies." See Hale's P. C. 488; Dalt. c. 98. Serjeant Hawkins, 1 Hawk. P. C. ed. Leach, b. 1, c. 28, s. 11, says, "If a person, having actually committed a felony, will not suffer himself to be arrested, but stand on his own defence or fly, so that he cannot possibly be apprehended alive by those who pursue him, whether private persons or public officers, with or without a warrant from a magistrate, he may lawfully be slain by them." Justice Blackstone adds the salutary caution, that there must be an *absolute necessity* apparent, 4 Bl. Com. 180, otherwise homicide in such a case is not justifiable; which rule is also applicable to such cases as the above.

¹ 20 Law J. Rep. (N. S.) M. C. 5. 15 Jur. 134.

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same county, in the castle of Newcastle-upon-Tyne, in the same county, on the 26th of February, A. D. 1850, Bryan Straughan, George Williamson, and John Wiley, were jointly indicted for stealing and receiving five hens and two cocks, the property of Thomas Davison. It was proved, that on the morning of the 28th of January, in the same year, about half past four, Straughan and Williamson were seen to go into the house of John Wiley's father, with a loaded sack, that was carried by Straughan. John Wiley lived with his father in the said house, and was a higgler attending markets with a horse and cart. Straughan and Williamson remained in the house about ten minutes, and then were seen to come out of the back door, preceded by John Wiley with a candle, Straughan again carrying the sack on his shoulders, and to go into a stable belonging to the same house, situated in an enclosed yard at the back of the house, the house and stable being on the same premises. The stable door was shut by one of them, and on the policemen going in they found the sack lying on the floor, tied at the mouth, and the three men standing round it as if they were bargaining, but no words were heard. The sack had a hole in it, through which poultry feathers were protruding. The bag, when opened, was found to contain six hens, two cocks, and nine live ducks. There were none of the inhabitants up in the house but John Wiley, and on being charged with receiving the poultry, knowing it to be stolen, he said "that he did not think he would have bought the hens."

The jury found Straughan and Williamson guilty of stealing the poultry laid in the indictment, and John Wiley guilty of receiving the same, knowing it to be stolen.

The Bench told the jury that the taking of Straughan and Williamson, with the stolen goods as above, by Wiley, into the stable, over which he had control, for the purpose of negotiating about the buying of them, he well knowing the goods to have been stolen, was a receiving of the goods by him within the meaning of the statute.

The question for the opinion of the Court was, if the conviction of Wiley was proper.

Otter, for the prisoner. The conviction is wrong. The direction of the chairman of the Quarter Sessions does not lay down a correct rule. Wiley ought not to have been convicted unless he had possession of the property. He never did receive it at all within the meaning of the stats. 3 W. & M. c. 9, the 22 Geo. 3, c. 58, and the 7 & 8 Geo. 4, c. 29, s. 54. Wiley's leading the thieves into the stable was no receipt of the stolen property by him. The thieves retained the actual possession of the property all the time. There cannot in law be a joint possession by the thief and receiver. The thief, it is submitted, must have parted with the possession to another person, to constitute the latter a receiver. *The Queen v. Parr*, 2 Moo. & R. 346. If a thief says to a friend, "I have here a stolen watch, will you buy it?" and the friend answers, "Come home to my house with it, and sleep there, and we will talk about it in the morning," and the thief goes to his friend's house, and sleeps there with the watch in his

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pocket, the owner of the house, it is submitted, could not be convicted as a receiver.

[LORD CAMPBELL, C. J. Suppose a thief brings a large hamper to a friend's house, and tells him it contains stolen goods, and asks permission to leave it in the house all night, could not the owner of the house be convicted as a receiver?]

If the thief left the hamper, he would be liable; but not so if the thief remained with the hamper all the time. The fact of the bargain being made in Wiley's father's stable, cannot affect Wiley's liability as a receiver any more than if it were made on a common or in a field.

[LORD CAMPBELL, C. J. Suppose the policemen had come in just after the bargain had been concluded, and before the fowls had been handed over to Wiley, do you contend that in that case Wiley could not have been convicted as a receiver?]

The conclusion of the bargain, it is apprehended, would have made no difference, if the possession of the property had not been delivered to Wiley. *The Queen v. Hill*, 1 Den. C. C. 453; s. c. 18 Law J. Rep. (N. S.) M. C. 199, shows that when goods are sent by a common carrier, consigned to a particular party, although by law the consignee of goods so sent has a potential possession as soon as they are delivered to the carrier, yet the consignee cannot be convicted as a receiver without an actual delivery to him. What is sufficient as a receipt for civil purposes, is not enough to affect a person with criminal liability as a receiver. In *Farina v. Home*, 16 Mee. & W. 119; s. c. 16 Law J. Rep. (N. S.) Exch. 73, it is said, by Parke, B., that a receipt is "the delivery of the possession of the goods on behalf of the vendor to the vendee, and the receipt of the possession by the vendee." If Wiley had refused to give the price the thieves asked for the fowls, they would have been able to have taken them away. Wiley cannot be made criminally liable for a receipt which would not have been sufficient under the Statute of Frauds. It may also be observed, that the house and stable were not in the possession of Wiley, but of his father.

[LORD CAMPBELL, C. J. Suppose Wiley had said, "Let me feel the fowls," and had taken them into his hands, could you contend that he would not then have had the possession?]

Perhaps not; but here he never had the fowls in his hands, or the power to take them into them. He intended to obtain possession, but the bargain being incomplete, he never did obtain it. Wiley never had any manual possession of the goods, and it is quite clear that the thieves never intended that he should have them, until the price was agreed upon and the bargain completed. The thieves had such a possession that they might have maintained trespass, *Purnell v. Young*, 3 Mee. & W. 288; s. c. 7 Law J. Rep. (N. S.) Exch. 80; *Ashmore v. Hardy*, 7 Car. & P. 501; or brought an indictment for larceny against any one who should have stolen the property from them. *The King v. Wilkins*, 2 Leach, C. C. 582.

Liddell, for the Crown. There is sufficient evidence stated in the
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case to warrant the conviction. In East's P. C. 765, it is thus laid down: "As to what general evidence shall be held to constitute a receiver under the statutes of William and Anne, and 22 Geo. 3, c. 58, it is to be observed, that the words are in the disjunctive, "receive or buy." Therefore, it follows that in order to constitute a receiver generally so called, it is not necessary that the goods should be actually purchased by him, neither does it seem necessary that the receiver should have any interest whatever in the goods. It is sufficient, if they be in fact received into his possession in any manner *malo animo* so as to favor the thief, or without lawful authority express or to be implied from the circumstances." The same position is upheld in *The King v. Davis*, 6 Car. & P. 177. *The King v. Richardson*, Ibid, 335, shows that a man may be a receiver without having any interest or profit in the stolen property. The law of delivery and acceptance, under the Statute of Frauds, has no bearing on the present question. The receiving the thieves into the house, in the first instance, was sufficient to warrant the conviction. Wiley had a constructive possession, by reason of his assisting the thieves in carrying the sack into the stable. Either an actual or constructive possession is sufficient to render a man a receiver. His carrying the candle, to help the man who carried the sack, amounts to the same thing as if he had carried the sack himself. There may be an actual possession without manual possession. If a person receive stolen goods into his possession in any manner *malo animo*, he may be convicted as a receiver. *Rex v. King*, Russ. & R. 332. The expression "have in possession," which is nearly equivalent to the term "receive," is defined in the interpretation clause of the stat. 2 Will. 4, c. 34, s. 21, relating to the possession of counterfeit coin to mean "having in any place as well as having in personal possession," and persons who had no personal possession of counterfeit coin have been convicted under it, as having it in their possession. *The Queen v. Rogers*, 2 Moo. C. C. 85. *The Queen v. Gerrish*, 2 Moo. & R. 219.

Otter replied.

After retiring to consult for a short time, the Judges returned and delivered their opinions *seriatim*.

MARTIN, B. I am of opinion that this conviction is wrong. The question turns upon the construction of the stat. 7 & 8 Geo. 4, c. 29, s. 54, and on the meaning to be put upon the word "receive," used in that section. The true rule for the construction of a statute is, as Parke, B., lays down in *Becke v. Smith*, 2 Mee. & W. 191; s. c. 6 Law J. Rep. (N. S.) Exch. 54, "to adhere to the ordinary meaning of the words used and to the grammatical construction, unless that is at variance with the intention of the legislature, or leads to any manifest repugnancy." The question is, What was meant by the word "receive," as applied to this case? It appears that two men stole some fowls, put them into a sack, and brought them into the house of Wiley's father, for the purpose of selling them to Wiley; that they all three went out of the house into the stable, the thieves

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carrying the sack, and Wiley preceding them with a candle; that the stable door was shut, and that the policemen on opening it found the sack on the ground and three men standing round it as if bargaining. Upon this case I am of opinion that Wiley never did receive these articles. I entirely agree that the question arises upon the possession. There was no property in these fowls in any of them. The men who stole the fowls had them in their possession, and intended to hold them hostilely to Wiley, and never intended to let him have them, unless some bargain were made between themselves and Wiley for the purchase of them. I think that, in the ordinary acceptance of the word "receive," Wiley could not be said to have received this property, and that, therefore, he ought not to have been convicted.

TALFOURD, J. I also am of opinion that this conviction was wrong. The question turns entirely upon the meaning to be put upon the word "receive" in the statute. Neither Wiley nor the thieves had any property in the stolen goods; but the parties asserting the possession are the two thieves, and the position of Wiley was such as to exclude the notion of his having the possession, as he was engaged in trafficking for the purchase of them. The whole matter seems to me to have been only inchoate.

WILLIAMS, J. I am of opinion that the conviction was right. I think that the case was made out against Wiley, if it were made out that he had possession of the fowls with a corrupt and wicked mind. There is no doubt that he knew that the fowls were stolen. The only question is, whether he had the possession of them. Now, the three men had a common purpose of carrying the fowls to the stable. In order to effectuate that common purpose, it was necessary that one of the party should have manual possession of the goods, and accordingly one of them had, but not Wiley. Nevertheless, as the act was done in the execution of the common purpose, they were all, in my judgment, agents one for the other in the execution of that common purpose, and the possession of the one was the possession of the other. Wiley therefore had, I think, such a possession as to justify his being convicted as a receiver of the stolen property.

PLATT, B. I am of opinion that the conviction was wrong. In order to constitute Wiley a receiver, I think that it was necessary to show that the goods were in such a position as to be in his dominion as between him and the thieves, and exclusive of that of the thieves. It is urged, that while Wiley was lighting them with the candle, and the sack was being carried into the stable, they all three had a joint possession. But I think that no such construction ought to be put upon that circumstance, as no bargain was begun at the time; and the thieves retained the possession and control over the goods. It seems to me too much to say that a party can be treated as guilty of receiving stolen goods who only contemplated receiving them if the bargain were completed.

ERLE, J. I am of opinion that the conviction is right, and on two grounds. The first ground is because Wiley coöperated with the thieves in removing the goods into the stable, which was under Wiley's control, for the purpose of more securely effecting a bargain respecting them. Now, if Wiley had taken part in the actual carrying of the goods, there would have been no doubt, I believe, in the minds of many of my brothers but that he would have been rightly convicted. But he lighted a candle, and preceded the thieves, while they carried the sack; and I think that in so doing he coöperated with them so as to render himself liable to be convicted as a receiver. I come to this conclusion on the principle of law that a person who assists a thief in removing to a place of safety goods which the latter has already removed from the owner's premises, cannot be convicted of larceny; but it seems to me that the person who so co-operates is a criminal, and that the law would reach him as a receiver. The other ground on which I think that this conviction may be sustained is, that I attach a wider meaning to the word "receive" than has been given to it by some of my brothers. The rules respecting property which have relation to civil rights seem to me to have no application here. Several statutes have been passed to render an accessory after the fact more open to punishment than he was at common law. I think that the word "receive," with respect to stolen goods, should be construed with reference to the word "harbor" applied to the thief. If a man harbors the stolen goods, knowing them to be stolen, for the purpose of aiding the thief, he is liable under the statute as a receiver. If he is the owner of a stable, and authorizes thieves to deposit stolen property on the premises, he would be liable in like manner; and it seems to me that he is not the less liable because the thieves remain there also. If they bring the property there with his consent, he is, I think, guilty of receiving it. The earlier statutes did not contemplate that there must be any bargain or transfer of the goods to a man to constitute him a receiver. In the 29 Geo. 2, c. 30, it was made an offence to leave the window, door, or shutter of any premises open at night for the purpose of offering a thief a place of deposit for any stolen lead, or other metal. In East's P. C. 765, it is expressly laid down, "that it is not necessary that the goods should be actually purchased by him, nor does it seem necessary that the receiver should have any interest whatever in the goods. It is sufficient if they be in fact received into his possession in any manner *malo animo*." So in 2 Russ. on Crimes, 247, the following expression of Taunton, J., in summing up to the jury in *The King v. Richardson*, is adopted: "If the prisoner received the property for the mere purpose of concealment, without deriving any profit at all, he is just as much a receiver as if he had purchased it. It is a receiving within the meaning of the statute." On both these grounds I am of opinion that the conviction is right. I may add, that on the second ground I take into my consideration the facts stated in the case which are not adverted to in the summing up.

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CRESSWELL, J. I agree with my brothers Erle and Williams in holding that this conviction is right. I take it that the direction embodies all the circumstances under which the men went into the stable. Now, Wiley brought a light, preceding the thieves, as they carried the sack. He, therefore, was assisting them in carrying the goods into the stable. If the goods had been set aside by the other two, but had not been finally removed from the premises of the owner, and Wiley had gone with them to assist in removing them from the place where they were left, and had carried a candle to assist in removing them, he would without doubt have been guilty of an asportation and larceny. He must, therefore, have had a joint possession. But if we merely substitute a place of deposit for the premises of the owner, and suppose that Wiley assisted in like manner in removing the goods from that place, there must, in this case also, be a joint removing by them all. In the very act of removing the goods into the stable, for the purpose of negotiating for the purchase of them, I think that Wiley became a receiver of them within the meaning of the statute. If it were necessary, I should be inclined to concur with my brother Erle, in giving a larger interpretation to the word "receive" than some persons put upon it. But it does not, I think, become necessary to do so for the determination of this case.

MAULE, J. I think that the conviction is wrong.

COLERIDGE, J. I also think that the conviction is wrong. If the direction of the Bench to the jury be construed strictly, it perhaps might limit us in deciding whether Wiley was properly convicted as a receiver to a consideration of this state of facts, that Wiley led the thieves into the stable, with a guilty knowledge that the goods were stolen, for the purpose of bargaining for them. But I think it far better to consider the question with reference also to the taking the goods to Wiley's father's house. Wiley then was proved to have been in the house with the thieves, who had the goods in their possession, and to have helped them, with the goods in their possession, to a place under his control; and he did this with a knowledge that the goods were stolen, and with the purpose of buying them under a contingency which never happened. It is not the case of a joint possession in my view of it. In my opinion, "receiving" must import possession, actual or constructive. I cannot find either here. I think, therefore, that the conviction is wrong. It is of great importance that in the administration of the criminal law we should proceed upon broad principles of construction, intelligible to common understandings.

PATTESON, J. I think that the conviction is wrong. I do not think it necessary, that in order to constitute a man a receiver it is necessary that he should touch the goods, or that under certain circumstances a party having a joint possession with the thieves may not be convicted as a receiver; but, I think, to make a person liable as a

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receiver, the goods must be under his control. Now, here the goods remained all along in the manual possession of the thieves. All that Wiley did was to conduct the thieves to a place where he proposed to bargain for the purchase. How far the circumstance of their being found with the sack lying on the floor between them might affect him as a receiver, I cannot inquire, for the chairman put the question upon the taking the thieves into the stable. But I am inclined to think that that fact would not have been sufficient to fix Wiley as a receiver, for it was not intended that the goods should be taken by him until the bargain had been completed.

ALDERSON, B. I agree with the majority of the Judges in holding this conviction wrong. There was nothing to show that the goods ever were out of the manual possession of the thieves. If the property had ever been out of their possession while in the house with Wiley, and Wiley had afterwards joined with them in removing the goods to another place, he might, I think, have been found guilty as a receiver. But there is nothing to prove that the sack was ever removed from the back of Straughan during all the time, nor is there any thing to show any previous concert between Wiley and the thieves. Wiley intended to bargain for the fowls, and to take the possession of them if the bargain was completed. There must be, in all cases, some dividing point as to when the receiving commences, but in this case, I do not think that the dividing point was reached. The summing up of the Bench gave in my judgment an inaccurate rule for the direction of the jury.

PARKE, B. I am of opinion that the conviction was wrong. We must consider only the precise point submitted to us, and not speculate what the evidence might have proved in the opinion of the jury, had the case been properly submitted to them. I think that the word "receive" in the statute is to be understood, in its ordinary acceptance, as meaning either actual or constructive receipt. The taking Straughan and Williamson into the stable did not, in my opinion, give any possession to Wiley, for the two former never intended to part with the goods; nor was it meant that Wiley should have the possession of them, except, as my brother Coleridge put it, on the contingency of his becoming a purchaser. The sole question is, whether the leading the thieves into the stable was a receiving of the goods. Now, it seems to me, that there must be a distinction made between receiving the stolen goods, and receiving the thief. It is not, I think, a receiving of the stolen goods if you receive the thief with the stolen goods. The receiving the men with the sack into the stable, is not more a receiving of the stolen goods, than the receiving a thief, who, to the party's knowledge, has a stolen watch in his pocket, is a receiving of the watch.

LORD CAMPBELL, C. J. I think that the conviction was right. In my opinion, there is a receiving within the meaning of the statute, whenever a person knowing that goods are stolen has possession of

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them for a bad purpose. It is immaterial whether he claims any property in them. We are to look simply to whether there was a possession *malo animo*. In this case there was no manual possession by Wiley, but there may be a possession without a manual possession. The sack containing the fowls was brought to Wiley's father's house, and Straughan, Williamson, and Wiley entered into the common purpose of carrying the sack from the house to the stable over which Wiley had the control. That was an illegal purpose. For the execution of that purpose, Wiley, I am of opinion, was in possession of the goods. There was no intention, indeed, on the part of the thieves, of parting with the property to Wiley; but he entered with them into the common purpose of carrying the sack into the stable. Though Straughan carried the sack on his back, Williamson must be taken to have had as much a possession of the sack as Straughan; so also Wiley, it seems to me, was as much in the possession of it as Williamson. It is true that Wiley did not touch the sack, but he carried the candle to light the man who carried it. If he had assisted Straughan in actually carrying the sack, there would then have been a clear joint possession; but it cannot, I think, matter that Straughan alone carried the sack on his shoulders, and the others assisted him. It seems to me that there was what amounts at common law to a joint possession in all three, while they were carrying the sack to the stable. Though it was denied at the bar, it has been decided that there may be a joint possession by the thief and receiver. We are asked, I take it, to give an opinion upon the whole transaction. It seems to me that when the sack lay on the floor of the stable, it was in the possession of Wiley quite as much as of the thieves. It cannot be said, that there is no possession by a receiver unless the thief intends to part with the possession permanently. There was, in my judgment, evidence from which the jury were justified in coming to a conclusion that Wiley was guilty of receiving the stolen property. I therefore think that the conviction was right; but as the majority of the Judges are of a contrary opinion, the entry must be that the party convicted ought not to have been convicted. — *Conviction reversed.*

[Before POLLOCK, C. B., WIGHTMAN, WILLIAMS, and TALFOURD, JJ., and MARTIN, B.]

REGINA v. FERRALL.¹

December 20, 1850.

Liability of a Soldier for the Maintenance of a Bastard — Mutiny Act, 12 & 13 Vict. c. 10.

A soldier is liable to an indictment for disobeying an order of Justices requiring him to pay for the maintenance of a bastard child, notwithstanding the provisions of the 52d section of the Mutiny Act, such an indictment being "a criminal matter" within the exception in that statute.

¹ 20 Law J. Rep. (N. S.) M. C. 39. 15 Jur. 42.

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At the Quarter Sessions for the borough of Maidstone, held before Sir Walter B. Riddell, Bart., recorder, on the 12th October, 1849, Arthur Ferrall, sergeant of dragoons in her Majesty's service at Maidstone, was tried for disobeying an order of two Justices of the borough, made in petty Sessions on the 20th July, 1849, whereby they adjudged the defendant to be the putative father of a bastard child, born on the 23d April, 1846, of Ann Kennard, and ordered him to pay to her the sum of 1s. 9d. per week from the 11th July, 1849, together with the costs of the order. The order was made under the Act for the Amendment of the Poor-law, 7 & 8 Vict. c. 101, s. 3. The order was duly served, and on the 23d August, 1849, Ann Kennard demanded payment of the amount then due, and the defendant refused, and said that he did not intend to pay or to obey the order. Upon that refusal no further proceedings under the act or the order were taken, but the defendant was charged with, and indicted for, a misdemeanor in not paying the sum due, as required by the order. The indictment in the first count, after reciting the order, charged that the said order, on the same 20th July, 1849, was duly served upon the said Arthur Ferrall, and he was required to obey the said order, but the said Arthur Ferrall, soldier, upon being so served with the said order as aforesaid, and being so required to obey the same as aforesaid, did not pay unto the said Ann Kennard, the mother of the said bastard child, (she being then living, of sound mind, and not in any jail or prison, or under sentence of transportation,) the sum of 1s. 9d. per week from the said 11th July, then instant, the said child being then and still living, and under the age of three years, and the said Ann Kennard then and still being a single woman; neither did the said Arthur Ferrall pay to the said Ann Kennard the sum of 9s. 6d., the costs mentioned in the said order, as by the said order he was required, but, on the contrary thereof, he, the said Arthur Ferrall, then and there, and unlawfully and contemptuously, did neglect and refuse so to do, and he hath not since complied with the said order, or any part thereof, although often required so to do; in contempt, &c., and against the peace, &c. The second count charged that the order of the said Justices herein before mentioned having been duly served, to wit, on the 20th July, 1849, aforesaid, afterwards, to wit, on the 23d August, 1849, and after the expiration of one calendar month from the making of the said order, the said child being then living, and the said Ann Kennard, the mother, being then and still living, &c., she, the said Ann Kennard, did personally demand of the said Arthur Ferrall payment of the sum of 10s. 6d., then due and owing for six weeks' maintenance of the said bastard child, being at the rate of 1s. 9d. per week, from the said 11th July, 1849, and also the sum of 9s. 6d., the amount of costs mentioned in the said order, in obedience to the said order; but the said Arthur Ferrall, of, &c., soldier, upon such demand, and being so and then and there required to make such payment as aforesaid, did not pay the said sums, or either of them, or any part thereof, as by the said order he was required, but, on the contrary, he unlawfully and contemptuously did neglect and refuse so to do, and he hath not since complied with the said order, or any part thereof, although often required so to

do; in contempt, &c., and against the peace, &c. At the trial, evidence was given of the order, the service of it, and the demand and refusal of payment. The prisoner was undefended by counsel, but referred to the 52d section of the Mutiny Act, 12 & 13 Vict. c. 10, whereby it is enacted, that "no person enlisted in her Majesty's service shall be liable to be arrested or taken therefrom by reason of any warrant of any Justice, or other process, for not supporting or leaving chargeable any wife or child, legitimate or illegitimate, or by any process or execution whatsoever, (except upon affidavit of debt exceeding 30*l.*, &c.,) other than for some criminal matter." The learned recorder directed the jury, that if they were satisfied with the evidence, they should find the prisoner guilty; and mentioned, that if it should become necessary, he should take the opinion of the Judges upon certain questions of law in this case. The jury returned a verdict of guilty. The recorder respited the judgment till the next Sessions, taking bail for the prisoner's appearance there. The questions reserved were, first, whether the indictment could be sustained; secondly, if so, whether a sentence of fine or imprisonment, or both, could be effectually carried into execution against the defendant, a soldier, having regard to the provisions of the Act 12 & 13 Vict. c. 10, s. 52.

Welsby, (under instructions from the Treasury,) now appeared for the defendant. The prisoner is a sergeant of dragoons in her Majesty's service, and he was indicted at the Quarter Sessions at Maidstone, in October, 1849, for disobeying an order of Justices requiring him to pay for the maintenance of a bastard child.¹ The indictment was for a misdemeanor, charging a contempt of a statute. It is material to consider the provisions of the Mutiny Act, 12 & 13 Vict. c. 10, s. 52, which was relied upon to defeat this prosecution. It is as follows: "And be it enacted, that no person whatever, enlisted into her Majesty's service as a soldier, shall be liable to be arrested or taken therefrom by reason of the warrant of any Justice, or other process, for not supporting, or for leaving chargeable on any parish, township, or union, any wife, or any child or children, legitimate or illegitimate, or (except in the case of an apprentice) on account of any breach of contract or engagement to serve or work for any employer; and no person enlisted as a soldier, or serving as a non-commissioned officer or drummer on the permanent staff of the disembodied militia, shall be liable to be taken out of her Majesty's service by any process, order, or execution issued out of or from any County or Inferior Court, or by any Judge or officer thereof, either for contempt of Court or otherwise, or by any process or execution whatsoever, *other than for some criminal matter*, unless an affidavit shall be made by the plaintiff, or some one on his behalf, for which no fee shall be taken, before some Judge of the Court out

¹ For the form of an indictment, A. D. 1789, against the father of a bastard child for disobeying an order of Justices for its maintenance and relief, see 4 Went. Pl. 227; and for an indictment for disobeying an order for a maintenance made before 4 & 5 Will. 4, c. 76, see 1 Burn's Justice, 398; 2 Chitty's C. L. Forms. As an indictment for disobeying an order of Justices, see *Reg. v. Brisby*, 13 Jur. 520.

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of which such process or execution shall issue, or before some person authorized to take affidavits in such Court, of which affidavit a memorandum shall, without fee, be indorsed upon the back of such process, that the original debt, for which the action has been brought, or execution sued out, amounts to the value of thirty pounds at least, over and above all costs of suit in the action or actions on which the same shall be grounded; and any Judge of such Court may examine into any complaints made by a soldier, or by his superior officer, and by warrant under his hand discharge such soldier without fee, he being shown to be duly enlisted, and to have been arrested contrary to the intent of this act; and shall award reasonable costs to such complainant, who shall have for the recovery thereof the like remedy as would have been applicable to the recovery of any costs which might have been awarded against the complainant in any judgment or execution as aforesaid; provided that any plaintiff, upon notice of the cause of action first given in writing to any soldier, or left at his last quarters, or place of residence before such listing, may file a common appearance in any action to be brought for or on account of any debt whatsoever, and proceed therein to judgment and outlawry, and have execution other than against the body." The first point to be considered is, can the indictment be sustained? It is no offence at common law to refuse to maintain a bastard child, and the Poor-law Act, 4 & 5 Will. 4, c. 76, s. 69, took away the penalty. This is not an indictment on a statute, but at the common law;¹ for inasmuch as the act empowers the Justices to do a certain thing, therefore the disobedience of their order is an indictable offence. [*Pollock*, C. B.— Would an indictment lie for disobeying an order of a County Court Judge?] There is a difference between an order requiring the payment of a sum of money, and an order directing the doing of some other act. [*Pollock*, C. B.— Omitting to pay a sum of money is different from disobeying an order to undertake some duty; a party might be so poor as not to be able to pay.] The Mutiny Act provides that no soldier shall be liable to be arrested or taken from her Majesty's service by reason of the warrant of any Justice, "or other process." Now, it is submitted that the sentence of the Court of Quarter Sessions is a "process" within the 52d section of the 12 & 13 Vict. c. 10. The object of the statute is, that the Queen shall not be deprived of the services of a soldier, except for a criminal offence, or for such an amount as specified. An award of execution by law to follow judgment is "process" within the act, which says any "process" or "execution" whatever. [*Wightman*, J.— Why must the consequences necessarily be imprisonment?] It is true that the conviction may be only followed by fine,² but it may, in the discretion of the Court, be followed by imprisonment. As this is a matter which may end in arresting and taking from her Majesty's service a soldier, the Court is bound to prevent the possibility of such a contingency. The words of the act are, no soldier shall "be liable" to be arrested. [*Martin*,

¹ See *Dickinson's Quarter Sessions*, by Talfourd, J., 440.

² See 1 *Burn's Justice*, 1150; *Dickinson's Quarter Sessions*, by Talfourd, J., 440.

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B. — The statute makes an exception; it says, by any process or execution whatsoever, "other than for some criminal matter." Criminal matter there means some crime, not the disobedience of an order to pay money. [Martin, B. — The 81st section of the Mutiny Act, 12 & 13 Vict. c. 10, provides that the ordinary course of criminal justice shall not be interfered with.] It is submitted that the soldier should not be placed in such a position as to be *liable* to be taken out of her Majesty's service, unless he has contracted a debt above the amount specified, or committed some actual crime. [Talfourd, J. — You say, that, if bound to repair a highway *ratione tenuræ*, no indictment would lie against a man who is a soldier, because he might possibly be imprisoned for disobedience?] Yes; and here is an indictment on which the prisoner is liable to be arrested and imprisoned; whereas the statute says, that, unless in the excepted cases, he shall not be liable. — *Cur. adv. vult.*

POLLOCK, C. B. This was an indictment against a soldier for disobeying the order of two Justices, declaring him to be the putative father of an illegitimate child, and directing him to pay a sum of money for its maintenance. The prisoner was found guilty; and the Court is of opinion that the conviction was right. Though I concur in the opinion that we cannot disturb this conviction, on the ground that it has been ruled for so long a time by the Courts that an indictment will lie for disobeying an order of Justices for the non-payment of money, I cannot help expressing my individual opinion that it seems very odd, that an order of Sessions for non-payment of money should be the subject of an indictment, when an order of any other Court cannot be so enforced. Though the prisoner is now on bail, he is liable to be brought up for judgment, and imprisoned at the discretion of the Court. With respect to the objection that the prisoner is a soldier, we are of opinion, that disobedience to the order of Justices is "a criminal matter," and that, consequently, a soldier is not exempted from being indicted and tried for it, as sect. 52 of the Mutiny Act expressly excepts "criminal matters." — *Conviction affirmed.*

[Before POLLOCK, C. B., MAULE, CRESSWELL, WILLIAMS, and TALFOURD, JJ.]

REGINA v. BARNES.¹

December 20, 1850.

False Pretences — Larceny — Servant.

It was the duty of the prisoner, who was a servant of the prosecutors, in the absence of their chief clerk, to purchase and pay for, on behalf of his masters, any kitchen stuff brought to their premises for sale. On one occasion, he falsely stated to the chief clerk that he had

¹ 20 Law J. Rep. (n. s.) M. C. 34. 14 Jur. 1123.

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paid 2s. 3d. for kitchen stuff which he had bought for his masters, and demanded to be paid for it. The clerk on this paid him the 2s. 3d. out of money which his master had furnished him with to pay for the kitchen stuff. The prisoner applied the money to his own use:—

Held, that as the clerk had delivered the money to the prisoner with the intention of parting with it altogether, the prisoner was not liable to an indictment for stealing the money, but that he might have been indicted for obtaining it by false pretences.

THE following case was stated by the Recorder of Canterbury:—

“Joseph Barnes was tried, before me, at the last October Quarter Sessions, 1850, for the city of Canterbury, and county of the same, upon an indictment which charged that he, being servant to George Neame and another, feloniously stole 2s. 3d., the property of his masters.

“The prosecutors were grocers in the city of Canterbury, and the prisoner, at the time of the alleged offence, had been their servant about three years. They were in the habit of purchasing large quantities of what they called ‘kitchen stuff’ to melt down. The course of business was for the sellers of the kitchen stuff to take it to the prisoner upon Messrs. Neame’s premises. It was his duty to receive it and weigh it, and if the chief clerk was in the counting-house, to give to the seller a ticket containing the date of the purchase, the weight, the price, the name of the seller, and the initials of the prisoner. The seller then took the ticket to the chief clerk, who paid him the price out of moneys furnished to him by the prosecutors for that purpose. In the absence of the chief clerk from the premises when any kitchen stuff was brought, the prisoner had authority himself to make the payment to the seller, and on afterwards producing to the clerk a ticket containing the above particulars, he repaid the prisoner out of the moneys so furnished to him by the prosecutors. The clerk was instructed by Messrs. Neame to pay all demands made by the prisoner in this way, upon the production by him of the ticket, without any inquiry as to whether any stuff was bought, or as to the quantity, or whether the alleged seller was or was not a customer of the firm. Upon the evening of the 13th of September, the prisoner went to the chief clerk in the counting-house and demanded 2s. 3d., which he said he had paid for eighteen pounds of kitchen stuff. He produced a ticket in the usual form, containing the name of Scott as the seller, and 2s. 3d. as the price, and received that sum from the clerk, from the moneys so furnished to him, which the prisoner applied to his own use. There had been no such dealing as that alleged by the prisoner, nor any such payment by him, nor had the prosecutors any customer of the name of Scott.

“It was objected, on behalf of the prisoner, that this was not a felony, because the property in the money, and not the possession only, was parted with by the prosecutors, and that the indictment should have been for obtaining the money by false pretences, and *Witchell’s Case*, 2 East, P. C. 830, was relied upon. I was of opinion that, although the facts might have supported an indictment for false pretences, yet that the prisoner, looking at the situation which he filled, as servant to the prosecutors, was guilty of felony, if the jury believed that he had obtained the money, knowing at the time that he was not entitled

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to receive it, and had applied it to his own use. I left the facts to the jury, who found the prisoner guilty, and he was sentenced to be imprisoned for four calendar months, with hard labor, in the city jail, where he now remains. I have to pray the judgment of my Lords, the Justices and Barons sitting in a Court of Appeal, whether the facts stated supported the indictment."

The case was not argued by counsel.

POLLOCK, C. B., now gave judgment. We are of opinion that the conviction on this indictment for stealing the money cannot be sustained. When the clerk delivered the money to the prisoner, he delivered it with the intention of parting with it altogether; and, therefore, although the prisoner may be indicted for obtaining money under false pretences, he is not liable to be indicted for the felony. — *Conviction reversed.*

[Before JERVIS, C. J., PATTESON, CRESSWELL, and ERLE, JJ., and MARTIN, B.]

REGINA v. MEARS and CHALK.¹

Hilary Term, January 18, 1851.

12 & 13 Vict. c. 76 — *Fraudulent Practices for procuring the Defilement of Women — Conspiracy.*

The prisoners induced the prosecutrix, a girl of fifteen years of age, who had left her place as a servant, to go to their house, one of them pretending that she had known the deceased parents of the prosecutrix, and saying that she would keep her until she got a place, and that they both would assist her in getting one. The prisoners were women of bad character, and the place where they resided was a house of ill fame. It was false that they or either of them had known the parents of the prosecutrix, and they took no step whatever to get her a place, but urged her to have recourse to prostitution. They introduced a man to her, and attempted, by persuasion, and holding out prospects of money, to induce her to consent to illicit connection with him. The prosecutrix refused to consent, and declared her intention of quitting the house; the prisoners refused to give her her clothes, and she left without them :—

Held, that the prisoners were rightly convicted of a conspiracy under stat. 12 & 13 Vict. c. 76; and that they might have been indicted for the offence at common law.

THE prisoners were tried before Edward Smirke, Esq., recorder of the borough of Southampton, at the Epiphany Sessions, the 7th January, 1851, on an indictment² under the 12 & 13 Vict. c. 76, "An

¹ 20 Law J. Rep. (N. S.) M. C. 59. 15 Jur. 66.

² The following is a copy of the indictment :—

"Borough, town, and County of the } The jurors for our lady the Queen, upon their
town of Southampton, to wit. } oath and affirmation, present,
that Mary Ann Mears, late of the parish of St. Mary, in the town and county of the
town aforesaid, single woman, being a person of wicked and depraved mind and dis-
position, and contriving and craftily and deceitfully intending to debauch and corrupt
the morals of one Johanna Carroll, as hereinafter mentioned, and to seduce her into
an infamous and wicked course of life, heretofore, and after the passing of a certain
act of Parliament for the better preventing the heinous offence of procuring the defil-

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Act to protect Women from fraudulent Practices for procuring their Defilement." The prosecutrix, Johanna Carroll, a girl aged fifteen years, whose father and mother had been dead for two years and upwards, had been put out to service by the guardians of the poor of Southampton. On Monday, the 18th November last, she left her last place, and, not having got another, she applied to the landlord of a public house at Southampton for a bed for that night. The landlord

ing of women, to wit, on the 14th day of November, in the year of our Lord 1850, with force and arms, at the parish aforesaid, in the town and county aforesaid, did knowingly, deceitfully, and unlawfully attempt and endeavor, as much as in her lay, to procure the said Johanna Carroll, the said Johanna Carroll then and there being a child under the age of twenty-one years, to wit, of the age of fifteen years, an orphan, and a servant out of place, to have illicit carnal connection with a man, to wit, a certain man whose name is to the jurors aforesaid unknown, by then and there knowingly and unlawfully, falsely and fraudulently pretending and representing to the said Johanna Carroll that she, the said Mary Ann Mears, was the friend of the said Johanna Carroll, and knew her father and mother, and that if she, the said Johanna Carroll, would go home with her, the said Mary Ann Mears, she, the said Mary Ann Mears, would keep her until she, the said Johanna Carroll, could get a place, and that she, the said Mary Ann Mears, would herself try all she could to get her a place; and by then and there, under such false and fraudulent pretences and representations, taking her, the said Johanna Carroll, to the home of the said Mary Ann Mears, and keeping her there for a long space of time, and soliciting her and trying to induce her then and there to have illicit carnal connection with the said man; whereas, in truth and in fact, the said Mary Ann Mears was not the friend of the said Johanna Carroll, and the said Mary Ann Mears did not intend to take, and did not take, the said Johanna Carroll home with her to keep her, the said Johanna Carroll, till she, the said Johanna Carroll, could get a place, or till she, the said Mary Ann Mears, could obtain a place for her, but craftily and subtly, with the wicked design and purpose, by the said false and fraudulent pretences, representations, and means aforesaid, to procure the said Johanna Carroll to have connection with a man as aforesaid, contrary to the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. And the jurors aforesaid, upon their oath and affirmation aforesaid, do further present, that Amelia Chalk, late of the parish aforesaid, in the town and county aforesaid, laborer, at the time of the committing of the said misdemeanor by the said Mary Ann Mears as aforesaid, to wit, on the day and year aforesaid, at the parish aforesaid, in the town and county aforesaid, the said Mary Ann Mears to do and commit the said misdemeanor wickedly, knowingly, and unlawfully did aid, abet, and assist, contrary to the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. And the jurors aforesaid, upon their oath and affirmation aforesaid, do further present, that the said Mary Ann Mears and the said Amelia Chalk, afterwards, to wit, on the said 14th day of November, in the year aforesaid, with force and arms, at the parish aforesaid, in the town and county aforesaid, knowingly, wickedly, and unlawfully, did, by false pretences, false representations, and other fraudulent means, attempt to procure the said Johanna Carroll, then and there being a child under the age of twenty-one years, to wit, of the age of fifteen years, to have illicit carnal connection with a man, to wit, a certain man whose name is to the jurors aforesaid unknown, contrary to the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. And the jurors aforesaid, upon their oath and affirmation aforesaid, do further present, that the said Mary Ann Mears and the said Amelia Chalk, afterwards, to wit, on the day and year aforesaid, with force and arms, at the parish aforesaid, in the town and county aforesaid, did, between themselves, conspire, combine, confederate, and agree together, wickedly, knowingly, and designedly, to procure, by false pretences, false representations, and other fraudulent means, the said Johanna Carroll, then being a poor child under the age of twenty-one years, to wit, of the age of fifteen years, to have illicit carnal connection with a man, to wit, a certain man whose name is to the jurors aforesaid unknown, contrary to the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity."

was unknown to her when she applied. The prisoner Chalk was present, and the prisoner Mears joined them shortly afterwards. The landlord said he could not give her a bed that night, but referred her to Mrs. Mears, who said that she would let her have a bed sooner than let her sleep out. The prisoners were at this time living in the same house at Southampton, and had no apparent means of subsistence except by prostitution, and receiving men into the house. The two prisoners then took the prosecutrix home. In the course of conversation on their way, and just after they got home, Mears having learned from the prosecutrix who she was, and that she wanted to get into service again, told her that she knew her father and mother, and that she would let the prosecutrix remain in her house without paying any thing till she could get a place, and that she, Mears, would also try to get one for her. The prosecutrix remained some days in the house looking for a place, doing household work in the daytime, and sleeping with a little girl at night. Mears gave her food whilst she was there. On Tuesday evening the prisoners brought two men to the house, who staid some time there, and drank with them. On Wednesday the two men again came to the house and slept there, each with one of the prisoners. On Thursday morning the prisoner Chalk talked to the prosecutrix, and advised her to go out and get money by going along with men, as she did; but the prosecutrix did not follow her advice. On that day three men came in the afternoon to the house, and, after staying a short time, went away. One of them returned later in the evening, and whilst he and the prosecutrix and both the prisoners were together in a room of the house, the man, who was unknown to the prosecutrix, called Mears out for a few minutes. In their absence, the prisoner Chalk told the prosecutrix that they had perhaps gone out to talk about her, the prosecutrix, and to ask the man whether she and the man would go into the bed-room together. On the return of Mears and the man, Mears called her aside, and asked her whether she had any objection to go into the bed-room with the man. The prosecutrix refused, on which Mears said to her that it was the best way of getting a living. Chalk also urged her to go with the man, and Mears told her that she would get some money from him if she did so. The prosecutrix persisted in refusing, and the man, after drinking with the woman, left the house late at night. Mears then abused the prosecutrix, charged her with being sly, called her offensive names, and said, that if she wanted to get a living she must get it as she did, if she bided with her; and she threatened to turn her out without her clothes. The prosecutrix said she would go then, but Mears said she should stay till next morning. On Friday a child of the prisoner Chalk, who was lying dead in the house, was buried. Early on Saturday the prosecutrix left the house, without being allowed to take back her clothes, and, having no friends or relations to go to, returned to the workhouse. The prisoners pawned part of her clothes, and Mears claimed to keep the rest to pay for the prosecutrix's lodging; but eventually she delivered them up to the inspector of police, who had been sent to demand them. The prosecutrix had no knowledge of the course of life followed by

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the prisoners till the third day, but she owned that she suspected it on the second. There was no proof that the prisoners, or either of them, ever knew the parents of the prosecutrix, or that they or either of them ever tried to get any place as a servant for her. Several witnesses to prove the girl's previous habits and good character, and other circumstances, were called for the prosecution. The prisoners offered no evidence, and made no statement in defence, and were not defended by counsel. The above facts were left to the jury as evidence under all the counts; and the jury were told that they could not find both prisoners guilty under the first and second counts, nor either of them under the last, unless they believed that they had acted in concert, and with the common object of procuring the illicit connection alleged in the indictment, by the false representations or the fraudulent means charged. The jury found both prisoners guilty on all the counts. The learned recorder passed sentence on each, but respited execution until the decision of this Court upon the following questions, which he thought proper to reserve, viz., first, whether the above state of facts was evidence to go to the jury on all or any of the counts; secondly, whether the counts, or any of them, disclose an indictable offence, and are valid in point of law.

C. Saunders (Cooke with him) now appeared for the Crown. This was an indictment upon an act of Parliament recently passed, the 12 & 13 Vict. c. 76, which provided as follows: "For the better preventing the heinous offence of procuring the defiling of women, which certain infamous persons do most wickedly practise, be it enacted, that if any person shall, by false pretences, false representations, or other fraudulent means, procure any woman or child under the age of twenty-one years to have illicit carnal connection with any man, such person shall be guilty of a misdemeanor, and shall, being duly convicted thereof, suffer imprisonment for a term not exceeding two years, with hard labor." This section contemplated the punishment of persons who had actually succeeded in procuring the defilement of a woman; but here, by reason of the resistance of the prosecutrix, no illicit intercourse had taken place. The indictment charged an attempt to commit a statutable offence, which attempt, being a contempt of a statute, was a misdemeanor. The last count charged a conspiracy to procure the defilement of the prosecutrix. In cases of false pretences it had been ruled, that the pretence must be an untrue representation of an existing fact; but the words of this statute are, "false pretences, false representations, or *other fraudulent means*." These words were very wide, and were intended to meet the case of procurers and procuresses who met young women at railway stations, and seduced them, or attempted to seduce them, by making untrue statements in such cases. Here the prisoners had falsely represented that they had known the deceased parents of the prosecutrix, and that they would afford her shelter till she got a place, promising to assist her in looking for a place; and the jury had found, that their object was to lead the girl to prostitution, by procuring her defilement, which, it is submitted, brings this case within the purview of the act of Parliament.

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JERVIS, C. J. We think it unnecessary to pronounce any opinion as to the first two counts, as there is a count for conspiracy, on which there can be no doubt the prisoners have been properly convicted. At common law, a conspiracy to procure the seduction of a woman was punishable as an offence against public decency and good morals. There is a case reported in 3 Burrows, 1434, *Rex v. Sir Francis Blake Deleval and others*, where the King's Bench granted a criminal information against the defendants for having joined in an unlawful combination and conspiracy to remove a girl of the age of eighteen out of the hands of one of the defendants, to whom she had been bound apprentice, and to place her in the hands of Sir Francis Deleval, for the purposes of prostitution. There the Court remarked, that, though many offences against continency fall properly under the jurisdiction of the ecclesiastical court, yet that offences against public decency and good manners are indictable at common law. In the present case, the jury have found that it was the design of the prisoners, by fraudulent means, to procure the defilement of the prosecutrix; and as the indictment charges a conspiracy for that purpose, we think that this conviction must be affirmed.

PATTESON, J. There is also the case in the State Trials, *Rex v. Lord Grey and others*, 3 St. Tr. 519; 1 East's P. C. 460, where Lord Grey and others were indicted for a conspiracy at common law to induce a young woman to leave her father's house to live in fornication with one of the defendants. There it was held, that the parties were properly indicted for a conspiracy, although the young woman herself had consented.

CRESSWELL and ERLE, JJ., and MARTIN, B., concurred. — *Conviction affirmed.*¹

[Before JERVIS, C. J., PATTESON, CRESSWELL, and ERLE, JJ., and MARTIN, B.]

REGINA v. KEALEY.²

Hilary Term, January 18, 1851.

False Pretences — Indictment — Allegation — False Pretence made to J. B. and Others — Variance — Surplusage.

An indictment charged the prisoner with attempting, by false pretences made to J. B. and others, to defraud the said J. B. and others of certain goods, the property of the said J. B.

¹ So a combination to effect the seduction and abduction of a female has been held in this country to be a conspiracy at common law. *Anderson v. The Commonwealth*, 5 Randolph, 627. And so has a confederacy to assist a female infant to

escape from her father's control, with a view to marry her against her will. *Mifflin v. The Commonwealth*, 5 Watts & Sergeant, 461. See further, *Respublica v. Hevce*, 2 Yeates, 114.

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and others. On the trial, it was proved that the prisoner made the false pretence set forth in the indictment to J. B. only, with intent to defraud J. B. and others, his partners, of property belonging to their firm:—

Held, that there was no variance between the indictment and proof, as the words “and others,” in the allegation that the false pretence was made “to J. B. and others,” might be rejected as surplusage.

THE following case was stated by Mr. Russell Gurney, Commissioner of the Central Criminal Court, for the opinion of the Judges.

At a general session of jail delivery for the jurisdiction of the Central Criminal Court, on Monday, the 10th of June, 1850, Mortimer Kealey was tried before me, upon an indictment charging him with the common law misdemeanor of attempting to obtain goods by false pretences, and to defraud the owners thereof, contrary to the statute.

The indictment charged, that the defendant made the pretences set forth in the indictment to John Bagallay *and others*, with intent to obtain and defraud them of the goods in question, their property.¹

John Bagallay and others were partners in trade; and it appeared in evidence that the defendant, in fact, made those pretences to John Bagallay, one of that firm, but that Mr. Bagallay refused to part with the goods sought to be obtained, in consequence of information regarding the defendant, received from another person. It also appeared that none of Mr. Bagallay's partners were present when the pretences were made, and there was no evidence of the false pretences having ever reached the ears of any one of them.

It was objected, on the trial, that the proof did not support the averment in the indictment, of the pretences having been made to John Bagallay and others, that the variance was fatal, and the prisoner entitled to his acquittal. But I decided that the objection ought not to prevail, and the defendant was convicted.

It appearing to me, however, that the point raised on the trial was one of doubt, and entitled to the consideration of the Justices of either Bench and the Barons of the Exchequer, upon a case reserved, I postponed judgment, in order that the opinion of the said Justices and Barons might be taken upon the case, and committed the defendant to the custody of the keeper of the jail of Newgate until the next Session, unless he previously entered into recognizances, himself in 200*l.*, and one surety in 200*l.*, or two sureties in 100*l.*, for his appearance at the said next Session, to receive judgment. The foregoing is the case upon which the opinion of the said Justices and Barons is required accordingly.

Parry, for the prisoner. There is a fatal variance between the indictment and the proof. The allegation that the false pretence was made to “John Bagallay and others,” is a material allegation, and ought to have been proved as laid. The evidence showed that the false pretence was made to John Bagallay alone. The object of

¹ The indictment alleged that the false pretences were made to John Bagallay and others, with intent to defraud the said John Bagallay and others of certain goods, the property of the said John Bagallay and others.

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alleging the false pretence, is to give the prisoner notice of the charge which he has to meet. *The King v. Perrott*, 2 M. & S. 379. *The King v. Mason*, 2 Term Rep. 581. It may be taken that the false pretence was made with intent to obtain the property of the firm. But there is no inference of law that a representation made to one member of a firm is made to the firm. Besides, the indictment does not even say that the representation was made to John Bagally and others, "*his partners*." It cannot be assumed that the "others" were his partners. If a false pretence be made to a clerk, with a view to defraud his employer, it is not sufficient to allege in the indictment as made to the master. The indictment was so framed in *The King v. Douglass*, 1 Camp. 212, and *The King v. Plestow*, Ibid. 494. The prosecutor must prove the offence laid in the indictment. Arch. Crim. Plead. 297, (ed. 1843,) 312, (ed. 1849.) It is only by virtue of the stat. 7 Geo. 4, c. 64, s. 14, that the expression "and others" is admissible in indictments, in the description of the owners of the property. That statute does not warrant so vague a description of the parties to whom a false pretence is alleged to be made. It never was put as a question to the jury, whether the prisoner intended to make the representation to the firm. If the expression "and others," in the indictment, be taken to mean certain other persons, the allegation is not supported by proof of a pretence made to John Bagally alone. Even if they were immaterial words, they ought to have been struck out at trial, but no application was then made to amend the indictment. Such a variance in a civil action would require amendment at *Nisi Prius*. *Masters v. Barrett*, 2 Car. & K. 717. *Bristow v. Wright*, Dougl. 640. 1 Smith's L. C. 324.

No counsel appeared for the prosecution.

JERVIS, C. J. I am of opinion that the conviction is right. There are three ways in which the allegation in the indictment, as to the false pretence, may be viewed. According to one view, the stat. 7 Geo. 4, c. 64, s. 4, may be taken as ingrafted into this case, so that the expression "and others" in the allegation, that the pretence was made "to John Bagally *and others*," may be read so as to mean the partners of John Bagally. If this were so, it would be important to consider whether a representation made to one of a firm is not a representation to the whole firm. It is not necessary to decide that point; but I should be inclined to think that it was. Secondly, the allegation may mean that the representation was made to John Bagally and several other persons. But an averment of a pretence made to A, B, and C, would, I think, be proved by evidence showing a pretence made to A only. The third, and I think the correct view of the case, is, that in the allegation "to John Bagally *and others*," the expression "and others" is surplusage. It is an improper allegation, and has no meaning. It, therefore, need not be proved, and it was not necessary to strike it out.

PATTESON, J. I think the conviction right. The words "and

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others" cannot be read as meaning John Bagallay's partners, for the statute does not authorize the using the expression "and others" in indictments as descriptive of individuals, except in alleging the ownership of property.

CRESSWELL, J. It seems to me that the evidence of the representation made to John Bagallay is sufficient to support the allegation of the indictment that it was made to John Bagallay and others.

ERLE, J. I think that the allegation in the indictment admitted only of proof of a representation made to John Bagallay. I also think that if the indictment had alleged that the representation was made to John Bagallay and John Noakes, proof that the representation was made to one of them would have supported the indictment.

MARTIN, B. I am strongly inclined to think that a representation made to one partner is a representation made to all, as one is an agent for all the rest; but that is immaterial to consider, for I quite concur with the rest of the Court on the other point. — *Conviction affirmed.*¹

[Before JERVIS, C. J., PATTESON, CRESSWELL, ERLE, JJ., and MARTIN, B.]

REGINA v. WELCH.²

Hilary Term, January 18, 1851.

*Counterfeit Coin — Indictment for "uttering and putting off" —
Offering it.*

The prisoner, in payment for some goods at a shop, put down on the counter a counterfeit shilling. The shopman took it up and said that it was bad. The prisoner then quitted the shop, leaving the coin there: —

Held, that the prisoner had "uttered and put off" the counterfeit shilling within the meaning of the statute.

THE following case was reserved by the Court of Quarter Sessions for the North Riding of Yorkshire, for the consideration of the Judges.

¹ In *Commonwealth v. Moor*, Thacher's Crim. Cas. 410, it was held, that an indictment alleging the obtaining of goods by false pretences made to a firm, was sustained by proof of false pretences made to one of the firm.

On the same principle, such an allegation may be sustained by proof of false pretences made to the clerk and salesman of the firm, he having communicated such pretences to one of the firm, and goods

having been delivered to the defendant upon them. *Commonwealth v. Harley*, 7 Metcalf, 462. *Commonwealth v. Call*, 21 Pick. 515. To convict a defendant on such indictment, it is not necessary to prove that he obtained the goods on his own account, or that he derived, or expected to derive, any personal pecuniary benefit therefrom. *Commonwealth v. Harley*, *supra*.

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The prisoner was convicted at the Quarter Sessions of the Peace for the North Riding of Yorkshire, on the 30th of December, 1850. The indictment charged the prisoner with having "uttered and put off," but not with having "tendered," to one Benjamin Dunning, a counterfeit shilling. The evidence proved that the prisoner went into the shop of Dunning, and asked to purchase some coffee and sugar, and, in payment of the same, he put down on Dunning's shop counter the counterfeit shilling in question, when Dunning took it up, and said to the prisoner that the shilling was a bad one. The prisoner then left Dunning's shop, leaving the shilling, but without the coffee and sugar. The prisoner was found guilty, and sentenced to be imprisoned and kept to hard labor for two calendar months, but execution of the sentence of hard labor was respited for one month.

The prisoner is in jail for want of bail to render himself in execution. I have now to request the opinion of the Judges, whether the charge of having "uttered and put off" was proved by this evidence.

No counsel appeared on behalf of the prosecution or defence.

JERVIS, C. J., delivered the judgment of the Court. The case finds that the coin was offered by the prisoner to the party, who however did not take it, and that the prisoner then ran away. We are asked whether this amounts to "uttering and putting off" the coin. It has been constantly determined, that to "utter and put off" a thing, is to "offer" it, whether it be taken or not. The conviction, therefore, is correct.

CRESSWELL, J. I remember a very strong case of forgery, in which the prisoner produced a forged receipt, but refused to part with it, and the party to whom he offered it took it from out of his hand, and the prisoner was convicted of having uttered and put it off.

The other Judges concurred. — *Conviction affirmed.*

[Before JERVIS, C. J., PATTESON, CRESSWELL, and ERLE, JJ., and MARTIN, B.]

REGINA v. DAWSON.¹

Hilary Term, January 18, 1851.

Forgery — Warrant and Order for the Payment of Money.

The prisoner forged and delivered as genuine to B, who owed money to A, a letter purporting to be written by A, and addressed to B, in which, after setting out the amount due from B, A was made to say, "Sir, — I hope you will excuse my sending for such a trifle," &c., "but I am obliged to hunt after every shilling:" —

Held, that the document was a forged "warrant" for the payment of money within the meaning of the stat. 11 Geo. 4, & 1 Will. 4, c. 66, s. 3.

Semble, that it was also a forged "order" for the payment of money.

¹ 20 Law J. Rep. (N. S.) M. C. 102. 15 Jur. 159.

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THE following case was stated by Martin, B.:—

At the session of jail delivery holden for the Central Criminal Court, in November last, (1850,) Frederick Augustus Dawson was tried, before me, upon an indictment founded on the stat. 11 Geo. 4, & 1 Will. 4, c. 66, s. 3, charging him with forging and uttering the document hereinafter set forth, (which was described in some counts as an order, and in others as a warrant,) with intent to defraud John Lowe.

The forged document was in the following form :

“ London.

“ Mr Lowe, —

“ Bought of C. Dawson, English and Foreign Merchant and Potato Salesman.

“ November 9th. — 2 Bushels of Apples, 9s.

“ Sir, — I hope you will excuse me sending for such a trifle, but I have received a lawyer's letter this morning, and unless I can make up a certain amount by one o'clock, there will be an action commenced against me, and I am obliged to hunt after every shilling.

“ Yours, &c.,

“ F. DAWSON.”

It appeared upon the trial, that Mr. John Lowe, to whom the document was directed, was indebted to Mrs. Frances Dawson, by whom it purported to be signed, and who carried on business in the name of C. Dawson, in the sum of 9s. for two bushels of apples; that the document was forged, and uttered by the prisoner to Mr. Lowe, as a genuine instrument coming from Mrs. Dawson, with the intention of fraudulently obtaining from Mr. Lowe the said sum of 9s.

The facts necessary to establish the case were clear; but it was objected, on the part of the defendant, that the document was neither an order nor a warrant within the meaning of the above section of the said statute. I directed the jury to consider whether the prisoner was guilty of forging and uttering the document with the fraudulent intention of obtaining from Mr. Lowe the sum of 9s., and appropriating it to himself. The jury thereupon found the prisoner guilty.

But, doubting whether such document was an order or a warrant within the above section, I respite judgment upon the indictment, and remanded the prisoner to the jail of Newgate, until and in order that I should have the opinion of Her Majesty's Justices and Barons under the act 11 & 12 Vict. c. 78, upon a case to be stated, whether the document in question was, under the circumstances, such an order or warrant. I request the opinion of the said Justices and Barons upon the foregoing case.

Ribton, for the prisoner. The forged document was neither an “order” nor a “warrant.” A document is not an order, unless the party who draws it has authority to do so, and unless the party to whom it is addressed is compellable to obey it. A banker's check is an order.

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[CRESSWELL, J. Suppose the person who draws the check has no account at the banker's, is it not an order? Does it depend upon the having an account with the banker, whether it be an order or not?]

If a man who draws a check has no account at the banker's, it would be a forgery. The cases show that having authority to draw is essential to the document being an order.

[CRESSWELL, J. The cases to which you refer have been overruled.]

[PATTESON, J. If this had been a genuine instrument, would it not have been a clear warrant to the party to pay the money?]

It is submitted not. Suppose it had been genuine, and Mr. Lowe had paid the money, and kept the document, and Mrs. Dawson had again demanded the money, the production of the document by Lowe would not have been any defence to him. It would not have proved that he had paid the money. It is not like a receipt, which would have proved the payment. It is a mere request.

[ERLE, J. How could this instrument have been more a matter of defence, had the words been added, "I hereby warrant you to pay the money"?]

A warrant is an instrument drawn by a party who has authority to draw it, addressed to a person who is not bound to obey; but to whom, if he obeys it, it affords an indemnity against consequences. *The Queen v. Vivian*, 1 Car. & K. 719, and *The Queen v. Thorn*, 2 Moo. C. C. 210. Here the document does not on the face of it show payment. It may also be questionable whether the legislature intended that the word "warrant" should bear so extensive a meaning as has been sometimes attempted to be put upon it. It is submitted, that it ought to be confined to instruments commonly known as warrants in commercial transactions, such a dividend warrants in respect of which there is a recognized course of dealing.

No counsel appeared for the Crown.

JERVIS, C. J. If this had been a genuine document, and Mr. Lowe had paid the bearer of it the 9s., and Mrs. Dawson had afterwards asked him to pay her again, Mr. Lowe would have been justified in refusing to do so. The case, therefore, shows that it would have been a warrant, and I think it would have been an order also. The conviction is right.

CRESSWELL, J. I should be sorry to raise any doubt as to the document, if genuine, being an order as well as a warrant.

The rest of the Court concurred. — *Conviction affirmed.*

Regina v. Amos.

[*Before JERVIS, C. J., PATTESON, CRESSWELL, and ERLE, JJ., and MARTIN, B.*]

REGINA v. AMOS.¹

Hilary Term, January 18, 1851.

Indictment for Arson — Shed — Carrying on the Trade of a Builder.

A supplied the materials and superintended the building of some houses on his own freehold estate, with the object of letting or selling the houses. He also erected a building, about twenty-four feet square, with slated roof, wooden sides, and glass windows. This was used as a storehouse for seasoned timber, as a place of deposit for tools, and as a workshop, where timber was worked up into its proper form, and prepared for use. The prisoner wilfully set fire to this building:—

Held, that in the indictment for arson the building was correctly described as a “shed.”

Semle, per Patteson, J., that A carried on the trade of a builder within the meaning of the statutes, and the building might properly be described as a building for carrying on the trade of a builder.

THE following case was reserved, by Talfourd, J., on the 16th of January, 1851.

The prisoner was tried, before me, at the last Sessions of the Central Criminal Court, for arson. The building which he was charged with burning was described in one count of the indictment as a “warehouse,” in a second as an “office,” in a third as a “shop,” in a fourth as a “shed,” and in the fifth as a “building used for the carrying on a certain trade, that is to say, the trade of a builder.” The building destroyed by fire stood on the premises of a gentleman who had been in the army, and was styled Captain Ross, at Clapham. Possessing a considerable freehold estate there, he employed his capital in building houses thereupon, of which from twenty to thirty were in the course of erection, himself providing the materials and superintending the work, which was performed by persons sometimes under contracts with him and sometimes directly employed by him, but always with his own materials. His object was to let the premises, or sell and convey them, as he could find purchasers. The building was erected by him four or five years ago, for the convenience of the works. It was twenty-four or twenty-five feet square, its sides of wood, with glass windows, its roof slated, and it was commonly called “the workshop.” It was used as a storehouse for seasoned timber, as a place of deposit for tools, and a place where timber was worked up in its proper form and prepared for use. At the time of the fire, the building contained timber prepared for use, which being burnt with it, made the owner’s loss amount to more than 1000*l*.

On the part of the prisoner, it was contended, that the building did not answer either of the descriptions of “warehouse,” “office,” “shop,” or “shed,” and that the use of it by Captain Ross was not a use of it in “the trade of a builder.” The jury found the prisoner guilty; and in answer to a question put by me to them, found that

¹ 20 Law J. Rep. (N. S.) M. C. 103. 15 Jur. 90.

Captain Ross had been, and was at the time of the fire, in the habit of employing his capital in the building of houses on his own land, and of purchasing and working up timber and other materials in their erection, for his profit and gain, and that the building was, at the time of the fire, employed by him for the purposes of such objects.

I respected the judgment, and reserved the question, whether the building destroyed answers the description in either count of the indictment, for the opinion of the Judges of the Court of Criminal Appeal.

Pulling, for the prisoner. The building burnt does not answer any of the descriptions of it in the indictment. It is not a building used for the carrying on the trade of a builder, because Captain Ross was not a builder in the legal sense of the term. He did not sell materials, or build for other persons, or obtain his principal livelihood by trade. He merely speculated in building on his own freehold land, as many noblemen and gentlemen do, whom it would be absurd to call builders. Buying land for the purposes of speculation, and building houses on it for sale, do not constitute a man a builder. *Stuart v. Sloper*, 3 Exch. Rep. 700; s. c. 18 Law J. Rep. (N. S.) Exch. 321.

[JERVIS, C. J. Mr. Stuart employed builders under him. Captain Ross builds houses himself without any builder.]

It does not appear that he ever carried on the trade of a builder, or that he was in the habit of buying and selling.

[ERLE, J. Must a person, to be within the protection of this statute, be such a trader as to be liable to the bankrupt laws?]

It is submitted that that is the true operation of the statute. Secondly, the building is not a "warehouse;" for a warehouse is a place of deposit for goods intended for sale. Dr. Johnson, in his Dictionary, calls a warehouse "a storehouse of merchandise." Richardson's Dictionary is in accordance with this interpretation. *The Queen v. Hill*, 2 Moo. & R. 458, overrules the doctrine in *Godfrey's Case*, 1 L. C. C. 287.

[JERVIS, C. J. Can you contend that this building was not a "shed" ?]

The word "shed" is used in the statute 7 & 8 Vict. c. 62, s. 1,¹ in conjunction with hovel, fold, and farm building. The act is entitled, "An Act to amend the law as to burning farm buildings." A shed must, therefore, mean some building used for farming purposes. This was not so used. This building was a strong, closed, permanent erection. A shed is described in Johnson's Dictionary as a

¹ Which enacts, that whoever shall unlawfully and maliciously set fire to any hovel, shed, or fold, or to any farm building, or any building or erection used in farming land, whether the same or any of them respectively shall then be in the possession of the offender, or in the possession of any person, with intent to injure or

defraud any person, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years.

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"slight, temporary covering." So in Milton's "Paradise Regained," Book xi. v. 72. It is a place where cattle may run for shelter. It means a covered building open at the sides. In *The Queen v. Munson*, 2 Cox, C. C. 186, Coleridge, J., distinctly held that such an erection as this was not a shed. It is not a "shop," for a shop is a place for the sale of articles, not for the making of them. *The Queen v. Sanders*, 9 Car. & P. 79. It clearly is not an "office;" for an office is a place where business is transacted. See Johnson's Dictionary, "Office." This building was never used for the transaction of business.

Garde, for the prosecution, was not called upon.

JERVIS, C. J. It is not necessary for the Court to express any opinion whether the building satisfies the description in each count. It is enough if the Court is satisfied that one count describes it correctly. It is not to be taken that we express any opinion on the other parts of the case. The facts of the case satisfy me that the building burnt falls within the meaning of the word "shed" in the statute 7 & 8 Vict. 62, s. 1. It is said that that act is confined to farm buildings, but I am of opinion that it is intended to have a more general application. The conviction, therefore, is right.

PATTESON, J. The building, in my opinion, is certainly a shed. It is a temporary building; for it is said, that it was erected for the purposes of the building. Whether it can properly be called "slender" may be a matter of opinion. I rather think that is a "building used for the carrying on the trade of a builder," but it is not necessary to determine that point.

CRESSWELL, J. This is a shed. The language of the act is, "whoever shall unlawfully and maliciously set fire to any hovel, shed, fold, or to any farm building, or any building or erection, used in farming land," &c., shall be guilty of felony. It does not say "any hovel, shed, or fold, or other farm building." The act, therefore, is not limited in its application to farm buildings. The building is a shed within the meaning of the statute, if it be that which in common parlance satisfies the word. In the Liverpool docks, sheds are built very firmly, and supported with iron pillars.

ERLE, J. We all are agreed that the building is a shed; but I think that there are other of the descriptions in the indictment under which it would fall.

MARTIN, B. I think the building a shed, and that it would fall under other of the descriptions as well. — *Conviction affirmed.*

Regina, v. Reid, Ackroyd, & Rothwell.

[Before JERVIS, C. J., ALDERSON, B., WILLIAMS, J., PLATT, and MARTIN, BB.]

REGINA v. REID, ACKROYD, and ROTHWELL.¹

February 8, 1851.

Robbery with Violence, Indictment for — Verdict of Assault with Intent to rob — Conviction for Common Assault.

The prisoners were indicted for robbery, and, at the time of the robbery, beating the prosecutor. The jury found as their verdict, that the prisoners were guilty of assaulting the prosecutor *with intent to rob him* : —

Held, that the finding did not warrant a conviction for the felony of assaulting with intent to rob, as the indictment for robbery with violence did not include a charge of the minor felony of assaulting with intent to rob, although the word "rob" was used in the indictment : —

Held, also, that the verdict being a finding of a *felonious* assault would not justify a conviction of assault under the statute 7 Will. 4, & 1 Vict. c. 85, s. 11 ;² that consequently there was no proper verdict, and that the judgment must be arrested.

There can be no plea of *autrefois acquit*, where there is no judgment in the former trial on the record. Jervis, C. J.

MARTIN, B., stated the following case for the opinion of the Court.

At the York Winter Assizes, December, 1850, the prisoners were tried on the following indictment: Yorkshire, to wit. The jury, for our Lady the Queen, upon their oath present, that George Reid, late of the parish of Doncaster, in the County of York, laborer, William Ackroyd, late of the same parish, laborer, and William Rothwell, late of the same parish, laborer, on the 18th of September, A. D. 1850, with force and arms, at the parish aforesaid, in the county aforesaid, in and upon George Smith, in the peace of God and of our said Lady the Queen then and there being, feloniously did make an assault, and him, the said George Smith, in bodily fear and danger of his life then and there feloniously did put, and two pieces of current silver coin of the realm, called sixpences, and one silk handkerchief of the value of 2s., of the moneys, goods and chattels of the said George Smith, from the person and against the will of the said George Smith then and there feloniously and violently did rob, steal, take and carry away; and that the said George Reid, William Ackroyd, and William Rothwell immediately before, at the time of, and also immediately after, such robbery as aforesaid, did then and there feloniously beat and strike, and use other personal violence to the said George Smith, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

The jury found that the prisoners were guilty of assaulting and beating George Smith, the person named in the indictment, with intent to rob him.

¹ 20 Law J. Rep. (N. S.) M. C. 67. 15 Jur. 181.

² The 11th section of the 1 Vict. c. 85, enacts, that "on the trial of any person for any felony whatever, where the crime charged shall include an assault upon the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding."

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It was objected by the counsel for the prisoners that, upon this finding, the prisoners were entitled to have a verdict of not guilty entered for them. I thought not; and that it was lawful to proceed to judgment against the prisoners; but, at the request of their counsel, and with the concurrence of the counsel for the prosecution, I respited the judgment until the next Assizes, in order that the judgment of the Justices of either Bench and of the Barons of the Exchequer might be obtained, which judgment I request may be given.

Overend now appeared for the prisoners Reid and Rothwell. The point is, whether a person charged with an assault and robbery can, on an indictment charging these offences, be found guilty of assault with intent to rob. [*Jervis*, C. J. — The first question is, whether an assault with intent to commit a robbery is included in the charge in the indictment; and, secondly, whether a felonious assault is within the stat. 7 Will. 4 & 1 Vict. c. 85, s. 11.] Robbery is defined by East, in his Pleas of the Crown, to be larceny with aggravation. The substantial part of the charge is the larceny. An assault stands on altogether a different basis. [*Alderson*, B. — Robbery is larceny with violence; you cannot separate violence from the idea of robbery.] Except in cases of menaces, which have been held to amount to violence. *Reg. v. Overend*, 2 East's P. C. 515. [*Alderson*, B. — I am not aware of any case where, on a charge of felony, a prisoner can be found guilty of some other felony not in the indictment. *Williams*, J. — Is there not a punishment provided by statute, in the case of felony, different from that for an assault, which is a misdemeanor? *Hall*. — No; it was so asserted in the argument in the case of *Reg. v. Bird*, but the punishment is the same in each case. *Jervis*, C. J. — No, not the same; felony is followed by attainder.] 7 Will. 4 & 1 Vict. c. 85, s. 11, enacts, that on the trial of any person for any of the offences thereinbefore mentioned, or for any felony whatever, where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding; and when such verdict shall be found, the Court shall have power to imprison the person so found guilty of an assault for any term not exceeding three years. The statute only applies where the jury have acquitted of the felony. If, therefore, the felonious assault be included in the indictment, the prisoners are acquitted of it by the verdict of the jury. [*Martin*, B. — Look at the words of the indictment; it states that the prisoners, "with force and arms, at the parish aforesaid, in and upon George Smith feloniously did make an assault, and him, the said George Smith, in bodily fear and danger of his life then and there feloniously did put." It then states that the prisoners robbed the prosecutor, and goes on to say, "that the prisoners, immediately before, at the time of, and also immediately after such robbery, as aforesaid, did then and there feloniously beat and strike, and use other violence to the said George Smith." It is laid, that the prisoners made a felonious assault,—proved that they made a felonious assault,—found by the jury that they made a felonious

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assault.] That only means that the assault is part of a transaction which is a felony. [*Erle, J.*—Is it competent to find a prisoner guilty of a smaller felony where he is acquitted of a larger one? *Jervis, C. J.*—It may be admitted that at common law you cannot find a prisoner guilty of a minor felony where a larger one is charged.] In *Reg. v. Peter Watkins*, 1 Car. & M. 264, it was held, that the burglariously breaking and entering a house, with intent to commit a rape therein, is not a crime which includes an assault, and, on an indictment for such a burglary, the defendant, it was ruled, could not be convicted of an assault under the statute. [*Alderson, B.*—That case was decided on a right principle, but it was a wrong decision.] In the present case, the substance of the offence charged is larceny; the prisoners are acquitted of that,—can you find them guilty of matter of aggravation? At common law, on an indictment for felony, a prisoner could not be found guilty of misdemeanor. The statute was made to meet this case; but you might have had fifty counts for felony, one for robbery, a second for assault with intent to commit a robbery, a third for larceny, and so on. The jury, instead of acquitting of the felony,—that is, *all* felonies included in the indictment, (which is the case contemplated by the 7 Will. 4, & 1 Vict. c. 85, s. 11,)—and finding the prisoners guilty of a misdemeanor, have acquitted the prisoners of the felony charged, and have found them guilty of a felony which is not charged in the indictment. *Van dercomb's Case*, 2 Leach's C. C. 716.

Dearsley appeared for the prisoner Ackroyd. What did this indictment charge,—one felony, or more than one felony? There was but one count, and, therefore, if it contained more than one charge of felony, it was bad for duplicity. [*Jervis, C. J.*—On an indictment for house-breaking, a party may be convicted of larceny.] The charge in the indictment is robbery: the jury have acquitted the prisoner of that, and have found him guilty of assault with intent to rob, which is another felony. [*Alderson, B.*—The question is, Is that latter felony expressly charged in the indictment?] If the very essence of a felonious assault be the intent, the intent must be laid; yet here that which is the essence of the charge is not mentioned in the indictment. It was quite competent for the jury to have found a common assault, but they have found a felony. [*Platt, B.*—In house-breaking you strike out part of the indictment, and the prisoner is convicted of larceny.] Yes; because enough remains in the indictment, after the charge of house-breaking is struck out; but here, if the felony with which the prisoner is charged be struck out, no felony remains. There ought to have been an averment that the prisoner committed an assault with intent to commit a robbery. Is that crime charged in the indictment? It is not. Have the jury found him guilty of felony? They have. If the jury can find a man guilty of a felony not in the indictment, then, on an indictment for burglary, they may find a man guilty of murder. [*Alderson, B.*—The jury have found not guilty of robbery. Why should not the prisoner be convicted of an assault? *Jervis, C. J.*—Make up the

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record,—not guilty of robbery,—guilty of a felonious assault not included in the indictment; what judgment is the Court to give? *Alderson, B.*—The statute says the jury may find the prisoner guilty of assault.] Yes; but the jury have acquitted of felony. [*Jervis, C. J.*—Of the felony.] That is, of every felony charged. The word “assault” is employed in the stat. 7 Will. 4, & 1 Vict. c. 85, s. 11, in contradistinction to “felony,” and clearly points to a misdemeanor. [*Williams, J.*—If it was not meant to apply to a misdemeanor, the statute was not wanted.]

Hall now appeared for the Crown. The statute provides, that where the crime charged shall include *an assault against the person*, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault. It is perfectly clear, that no person can be robbed violently without an assault on the person. The statute says that it shall be lawful to acquit of the felony charged, and to find the prisoner guilty of assault; the statute makes no distinction between assaults which are felonies and assaults which are not. The statute applies to the present case, as the word “assault” is employed without any qualification. If the prisoners were to be indicted again for felonious assault, they could plead *autrefois acquit* as to the minor offence. [*Alderson, B.*—A person has been indicted for assault with intent to commit a rape; he has been acquitted, and has then been indicted again for rape. *Overend.*—In the case of the Barnard Castle murder, the parties were acquitted of the murder, but were again put on their trial on a charge of robbery, though arising out of the same transaction. *Alderson, B.*—The indictment, if properly drawn, would have had a count for assault with intent to rob.] The indictment was not drawn by counsel. [*Alderson, B.*—I know that it was not drawn by the bar; and, because indictments are not properly drawn, all the expense and trouble of the present case is the result, while the law gets the discredit of it.] *Reg. v. Walker*, 2 Moo. & R. 446. [*Jervis, C. J.*—That case is in favor of the prisoners.] In the case of *Reg. v. Gould*, 9 Car. & P. 364, it was held, that an acquittal on an indictment for murder committed in the perpetration of a burglary, on which the prisoner might have been convicted of manslaughter, or even of assault, would be an answer to the indictment for burglary with violence. In the case of *Reg. v. Neale*, 1 Den. C. C. 36, which was an indictment under the 9 Geo. 4, c. 31, s. 17, for carnally knowing a girl above ten and below twelve years, the evidence proved a rape, yet the indictment for misdemeanor was upheld. [*Alderson, B.*—There there was a separate statute, making the offence a misdemeanor.] This is good conviction of assault. The statute does not distinguish between assaults felonious and not felonious. The jury have added something impertinently to their verdict, which they had no more power to add than if they had said that the prisoners were guilty of bribery; but that does not vitiate the verdict. Something has been said as to duplicity: the practice of having different counts in an indictment is quite a modern invention,—not earlier than the year 1700. Formerly, any number of felonies might have been included in one

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indictment, and the indictment consisted of but one count. What is charged in this indictment? First, it charges a felonious assault; secondly, a violent taking of money from the person. *Rex v. Vandercornb*, 2 Leach's C. C. 716. [*Jervis*, C. J. — When the taking *animus furandi* is struck out of the indictment, what remains?] *Reg. v. Huxley*, Car. & M. 596. If this be a bad verdict, the Court will award a *venire de novo*. The stat. 11 & 12 Vict. c. 78, authorizes this Court to make "such order as justice may require."

Overend replied.

The Judges retired for consultation, and after a short time returned into Court. The judgment was then delivered by

JERVIS, C. J. I am of opinion that in this case the finding of the jury does not justify the conviction, and that the result is, that the judgment must be arrested. The case may be considered in two points of view: first, without reference to the statute of Victoria; secondly, with regard to the effect of that statute. Taking it in the first point of view, it is contended that the finding of the jury finds a felony legally included in the indictment, and that therefore the prisoner might properly be convicted of it at common law. But I think that is not a correct view of the case. In order to convict a prisoner of a felony, not a felony primarily charged in the indictment, it is necessary that the minor felony should be substantially included in the indictment. Thus, an indictment for burglary includes an indictment for house-breaking, and generally also for larceny, and the prisoner on this may be found guilty of one or other of these felonies. But on an indictment for burglary, and for breaking and entering a house and stealing, the prisoner cannot be found guilty of breaking and entering a house with intent to steal. That is shown by *Vandercornb's Case*. The true way to look at the case is to strike out that portion of the indictment which is not proved, and then see what is the offence that is found. The jury in this case have struck out the robbery and that the prisoner did violently seize, take, and carry away the goods, and have left the assault only. It is said that as the indictment contains the technical word "rob," and that word includes in it the intent of robbing, therefore this indictment contains a charge of assault with intent to rob; but the expression "rob" the goods is not very correct, and the inaccurate use of the word will not, I conceive, have the effect contended for. I think, therefore, that the conviction cannot be sustained as a conviction of felony, because there is not on the face of the indictment the felony which the jury have found. If that be so, can the prisoner be convicted of the assault under the stat. 1 Will. 4, & 1 Vict. c. 85, s. 11? The statute says, that "when the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and find a verdict of guilty of assault." That does not mean in every case in which upon the face of the indictment an assault is alleged, but only where the offence or felony charged legally and technically includes an assault; as, for

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instance, in murder by violence, and the like; but when the felony charged does not of itself include an assault, as in the case of burglary with intent to steal, or arson, alleging an assault in the indictment will not bring the case within the statute. If the crime charged legally includes an assault against the person, a jury may acquit of the felony, and find the prisoner guilty of the assault. That means of an assault with the ordinary legal incidents of an assault; and such assault is made punishable with three years' imprisonment. Here the jury have found the prisoner guilty of an assault with intent to rob. The consequence is, that when the record is made up, there will be this state of things: an indictment for robbery, which includes robbery and assault, a verdict not guilty of robbery, but guilty of an assault with intent to rob, that is, guilty of a felony not charged in the indictment. There is, therefore, no finding upon the record which can warrant judgment being given. It is the case of an indictment with a wrong finding and no verdict. The judgment, therefore, must be arrested. The order of the Court will be, that the prisoners must be discharged from this conviction; but I shall not send the certificate down for some days. In the mean time the magistrates may take the depositions again, and the prisoners may be tried at the next Assizes on an indictment for the assault, with intent to rob. There can be no plea of *autrefois acquit*, as there is no judgment on the record.

The rest of the Court concurred. — *Conviction reversed*.¹

¹ This decision seems to rest upon the ground, that where an indictment alleges a felony which the jury fail to find, they cannot, under stat. 4 Will. 4, & 1 Vict. c. 85, s. 11, return a verdict of guilty of another felony, but only of a misdemeanor.

In *Massachusetts*, by Rev. Stat. c. 137, s. 11, any person indicted for a felony, if acquitted by the verdict of part of the offence charged, may be convicted of the residue thereof, and such person shall be adjudged guilty of the offence "*substan-*

tially charged by the residue of such indictment." Under this statute, a person indicted for rape may be convicted of an assault and battery. *Commonwealth v. Drum*, 19 Pick. 479. So may one indicted for manslaughter. *Idem*. And one indicted for rape upon his own daughter may be convicted of incest, the jury finding the illicit connection, but not that it was against the will of the daughter. *Commonwealth v. Goodhue*, 2 Metcalf, 193.

CASES

ARGUED AND DETERMINED

IN THE

ECCLESIASTICAL COURTS

AT

DOCTORS' COMMONS;

DURING THE YEARS 1850 AND 1851.

Court of Archb.

GORHAM v. THE BISHOP OF EXETER.¹

February 17 and 27; March 1, 3, 6, 8 and 9; and August 1, 1849.

Doctrine of the Church — Efficacy of Baptism of Infants.

A clerk, in his examination previous to institution by the diocesan, stated that he did not hold the doctrine that every infant is absolutely and unconditionally regenerated by the Holy Spirit in and by water baptism duly administered; and the diocesan refused to institute him by reason of his unsoundness in doctrine:—

Held, that the diocesan was justified in so refusing.

THIS was a proceeding by *duplex querela*. The only evidence before the Court was a book brought in on behalf of the bishop, which was published by Mr. Gorham, and contained the questions and answers of each party in the course of the examination. The accuracy of the book, so far as the questions and answers were concerned, was admitted, and the argument raised was, whether the answers given by Mr. Gorham showed his soundness or unsoundness on the doctrine of baptismal regeneration of infants, and whether, consequently, the bishop was or was not justified in refusing to institute him to a benefice. The particulars, so far as they seem necessary for the purpose of this report, are stated in the judgment.

Addams and *Robinson*, for the bishop. Our position is, that, according to the doctrine of the Church of England, baptismal regeneration is also spiritual regeneration to all who in mature age receive baptism rightly; and, in respect of infants, that baptismal regeneration is also spiritual regeneration simply. But the other side compare the two cases; and, in order to escape from the determinate meaning of the

¹ 13 Jur. 887.

words in the ritual, they rely upon the articles, and contend that worthiness of reception is necessary in all cases, irrespective of age, in order to the efficacy of baptism. But on this point the articles must not be taken alone, but in conjunction with the services in the Prayer-book; and then the doctrine of the church will be found to be as we have put in, and it is recognized to be such by the whole stream of authorities. [They referred to the Service for Infant Baptism, the Catechism, the Confirmation Service, and Articles 25 and 27, as these are severally commented upon in the notes to Mant's Prayer-book, and compared these offices and articles in the present Book of Common Prayer with the corresponding offices in the earlier books and articles. They also cited Jewel's Defence of the Apology, 219, ed. 1609; Jewel, Of Private Mass, 20, 262, 266; Hooker, b. 5, c. 57, 66; Taylor's Treatise on Baptism, in his Life of Christ; Waterland on Justification, and Antiquity of Baptism; Pearson on the Creed; the Savoy Conference, Cardw. Conf. c. 6, 7; the King's Book; the Bishop's Book; Cranmer's Last Disputation, in the Acts and Monuments; Lawrence's Bampton Lectures, 1804, 2d and 8th Sermons; Beveridge, Sermon 19, and on the Thirty-nine Articles; Barrow on the Doctrine of the Sacraments; Homilies — of Salvation, against Swearing, for Repairing of Churches, of Common Prayer, and the Sacraments, of the Resurrection; Bing. Antiq. b. 11, c. 1, s. 10; Heylin's Life of Laud, 32, 190.]

Bayford and Deane, contra. The articles are precise and distinct. If there be any difference between the articles and the ritual, the former must govern; but there is no difference, for, comparing the several offices in the Prayer-book, the language of each will be found hypothetical or charitable, and may be reconciled with the more dogmatic words of the articles. The authorities, from Cranmer down to the last century, distinguish spiritual from baptismal regeneration in every case. Therefore, if Mr. Gorham is unsound, those eminent persons were unsound too; but as they were not unsound, Mr. Gorham is also sound, for he holds their opinions. [They cited the three Services of Baptism; the Church Catechism; the Confirmation Service; the Burial Service; the Service for the Visitation of the Sick; the notes to Mant's Prayer-book; Burnet, Rogers, and Tomline on the Thirty-nine Articles; Hall's Olde Religion; Whitgift's Defence of the Answer to the Admonition, Preface, and pp. 179, 523, 621, 738; Prideaux's Fasciculus Controversiarum Theologicarum, Dedication, and p. 240; Stillingfleet's Unreasonableness of Separation, s. 1, p. 11; Reformatio Legum, De Baptismo, c. 18; The Institution of a Christian Man; Cranmer's, Calvin's, and Nowell's Catechisms; Cranmer's Treatise on the Sacraments; P. Martyr's Lectures on the Epistles to the Corinthians; Bucer's Scripta Anglicana, 477, 655; Homilies — of the Salvation of Mankind, of Faith, on Charity, on Common Prayer, of the Worthy Receiving and Reverent Estimating of the Sacraments, and for Whit-Sunday. They also cited the following authorities from the Parker Society editions: Zurich Letters, vol. 1, pp. 100, 135, 169, 293; vol. 2, p. 73; Philpot's Works, 45, 153; Latimer, 202; Ridley, 56; Hooper, 74, 129, 523; Becon, 173, 203, 207, 214; Coverdale, 80,

411; Calhill, 215; Grindal, 63; Sandys, 87, 190, 303. Also Cardw. Synod. 2, p. 562; Bullinger's Decades — of Sacraments, of Baptism; Nowell's Catechism, p. iv; Richmond's Selection from the Fathers, vol. 2, pp. 30, 135; Davenant's Lectures upon the Epistle to the Colossians, 208; Abbot's Reply to a Treatise on the Loss of Justification and Grace; Whitaker's *Proelectiones de Sacramentis*; Benefield's Tract, The Sin against the Holy Ghost Discovered; Barlow's Defence of the Articles of the Protestant Religion; Carleton's Examination of Montague's Appeal; Babington's Notes on Genesis, 53; Beveridge, Sermon 19; Usher's Sum and Substance of the Christian Religion, 407, 420; Sharp, Sermon, 13, on Regeneration; Nicholson's Exposition of the Catechism of the Church of England; Andrews's Library of Anglo-Catholic Theology, vol. 3, p. 248; Hopkins's Doctrine of the Two Sacraments; Cooper, Sermon 2; Geste's Life and Character, 116; Bridge's Defence of the Government Established in the Church of England, 482; Fulke's Defence of the English Translation of the Bible, (Parker Society edition,) 450; Mayer's Catechism, ed. 1630; Hooker's Discourse of Justification, (Keble's edition,) 3, 488, and Polity, b. 5, ss. 60, 64; Jewel's Treatise on the Sacraments, (Parker Society edition,) 1099, 1101, 1105, 1108; Jewell's Controversy with Harding, 519, 757; Taylor's Treatise on Baptism, in his Life of Christ; Keeling's Lit. Brit. 251; Wheatley on the Common Prayer, c. 7, s. 4; Cardw. Conf. 156; Bing. Antiq. b. 11, c. 2, s. 4; Pearson on the Creed, (Oxford edition, 1833,) 591; Barrow on the Unity of the Church, s. 5; Toml. Theology, On the Liturgy of the Church; Burn. Reform. vol. 2, part 11, p. 463. The stats. 1 Eliz. c. 2; 13 Eliz. c. 12; 14 Car. 2, c. 4; and 23 Geo. 2, c. 28, were referred to, as showing the Thirty-nine Articles to be the standard of doctrine; the 6th, 7th, and 8th Canons of Sess. 7 of the Council of Trent; the Constitution of Clement in the Council of Vienna, 1st tit. c. 11; and Burnet on the Twenty-seventh Article, with reference to the *opus operatum*.]

Addams, in reply. The articles must be construed by the ritual, (Conybeare on Subscription; Stillingfleet's *Eccl. Cas.* vol. 1, p. 120; Burnet's *Pastoral Care*, c. 6,) especially in the Church of England, which uses prayers in a language understood by the common people. The doctrine of the Church of England is at variance with that of Calvin, for in the catechism the belief is not in election, in the Calvinistic sense, but the universal election, or redemption of mankind. No Romish writer attributes heterodoxy to the Church of England with respect to baptism. The private sense of the reformers can be of little effect where it does not agree with the public sense and teaching of the church; and their opinions, if carefully studied, and not taken from isolated passages chosen for a purpose, will be found consistent with the doctrine of spiritual regeneration.¹

¹ The arguments on both sides were of great length, but, as it will be seen that the judgment confined the case within very narrow limits, it does not appear desirable to give the arguments at greater length, or refer to more of the authorities cited.

SIR H. JENNER FUST. The case on which the Court is called to decide has been most ably and elaborately argued in the early part of the year. The nature of the question to be decided, the vast body of learning which was brought into the discussion, and the important bearing which the decision will most probably have on the interest of the church and on religion, have created more than an ordinary degree of interest in the matter; and, as might well be imagined, have created a corresponding amount of anxiety and sense of responsibility in the mind of the Court. Greatly is it to be lamented when any difference of religious opinion arises between members of the same body; but still more is it to be lamented when the parties litigant before the Court stand in the relation of a beneficed clergyman and his diocesan. But it is useless to indulge in observations of this kind — it is now too late to derive any advantage from them; for the case has arrived at such a stage as absolutely requires the Court to pronounce its decision. I must refer briefly to the history of the case. The circumstances are these:—

The Rev. Mr. Gorham, an ordained minister of the Church of England, a Bachelor of Divinity, was presented to the vicarage of St. Just, in January, 1846, by the Lord Chancellor. On that occasion, Mr. Gorham, on presenting himself for institution by the bishop, produced such testimonials, as to his learning, ability, moral conduct, and sound religious principles, that the bishop did not think it necessary to subject him to any personal examination, with a view to ascertain the correctness of the testimonials with which he had been furnished. Mr. Gorham accordingly entered on the duties of the benefice, which he still continues to hold; but circumstances occurred which made it desirable for him to change that living for another, and accordingly he was presented by the present Lord Chancellor to the vicarage of Brampford Speke, in the County of Devon, and in the same diocese as his parish of St. Just. That presentation bore date the 2d December, 1847, and on the 6th of that same month Mr. Gorham wrote to the Bishop of Exeter, requesting his lordship to appoint an early day for his admission to the benefice, and suggesting that, as he was not removing into another diocese, neither his testimonials nor the exhibition of his letters of orders were requisite; but at the same time saying he should cheerfully comply with his lordship's wishes, in that respect, as far as was practicable.

An interchange of letters took place between Mr. Gorham and the bishop's secretary, Mr. Barnes, to which it is not necessary further to refer than to state, that the bishop declined to institute Mr. Gorham to the living of Brampford Speke until he had had an opportunity of satisfying himself of Mr. Gorham's fitness for the charge. That determination on the part of the bishop appears to have originated in certain expressions made use of by Mr. Gorham in the course of his correspondence with his lordship. The bishop, whether rightly or wrongly, conceived doubts as to the soundness of Mr. Gorham's religious opinions, and more especially with respect to his views on baptism. Whether the suspicions of the bishop had any sufficient foundation or not is immaterial to the question, the fact being that

the examination of Mr. Gorham did take place; and the result of that examination forms the subject of the inquiry now before the Court. It may be proper to state, however, that the Lord Chancellor, in the exercise of the patronage of the Crown which was vested in him by virtue of his high office, very properly required that the intended presentees to benefices within his gift should produce testimonials from three beneficed clergymen of the neighborhood in which they resided, and such testimonials should be countersigned by the bishop of the diocese. Mr. Gorham, having obtained his testimonials from three beneficed clergymen, as required, forwarded them to the bishop for his counter signature. His lordship did not think fit to comply with that request, but signified to the Lord Chancellor the doubt he entertained concerning the soundness of Mr. Gorham's religious views upon certain points of doctrine; and accordingly, on the margin of the testimonial, the bishop inserted these observations: "The clergymen who have subscribed this testimonial are highly respectable; but, as I consider the bishop's counter signature of such a document, if it be unaccompanied by any remark, as implying his own belief that the party to whom it relates 'has not held, written, or taught any thing contrary to the doctrine or discipline of the United Church of England and Ireland;' and as my own experience unfortunately attests, that the Rev. George Cornelius Gorham did, in the course of last year, in correspondence with myself, hold, write, and maintain what is contrary to the discipline of the said church; and as what he further wrote makes me apprehend that he holds also what is contrary to its doctrine, I cannot conscientiously countersign this memorial." That testimonial was dated the 12th August, 1847; it was signed by three beneficed clergymen, who said: "We have had opportunities of observing his (Mr. Gorham's) conduct, and during the whole of that time we verily believe that he lived piously, soberly, and honestly; nor have we at any time heard any thing to the contrary thereof, nor hath he at any time, as far as we know or believe, held, written, or taught any thing contrary to the doctrine or discipline of the United Church of England and Ireland."

The bishop, therefore, thought it right to apprise the Lord Chancellor, that, in his opinion, Mr. Gorham held opinions, on some subjects, that were contrary to the doctrines as well as the discipline of the Church of England; and he thought it right that he should not allow those testimonials to go to the Lord Chancellor without expressing his opinion of the unfitness of Mr. Gorham for the office to which he was to be appointed. The testimonial, so marked, was then forwarded to Mr. Gorham, and some correspondence seems to have taken place between that gentleman and the bishop; the result of which, however, was, that the bishop declined to take any other course than that which he had adopted. On that refusal, Mr. Gorham communicated the whole of the circumstances to the Lord Chancellor by letter. The Lord Chancellor, having fully considered the statements contained in those letters, together with the testimonial and the bishop's writing on the margin, in that same month announced to Mr. Gorham that he proposed to sign the fiat for his

presentation, notwithstanding the absence of the bishop's counter signature to the testimonial, declining, however, to enter into the question which had arisen between Mr. Gorham and the bishop; and on the same day, he, the Lord Chancellor, wrote to the bishop, saying he thought it right to sign the presentation; adding, that, having been furnished with testimonials which were perfectly satisfactory, he was satisfied it was his duty to do so, without deciding, or even entering into, the controversy. As to the propriety of the decision come to by the Lord Chancellor, there cannot be two opinions. As the representative of the Crown, in the dispensation of church patronage, he deemed it right to satisfy himself, by the best means in his power, of the qualification of the person to be presented to the benefice; and having received highly satisfactory testimonials, although they were unaccompanied by the counter signature of the bishop, his lordship, rightly and wisely, if I may be allowed so to speak,—considering that whatever power the law gave the bishop over the appointment must follow the presentation,—signed the presentation, and sent it to the bishop, who thereupon declined to institute Mr. Gorham until he had been subjected to an examination. Whether the bishop exercised his discretion wisely, is beside the question the Court has to determine; yet, at the same time, it may at least admit of a doubt whether the bishop was not justified in considering his counter signature of the testimonial as affirming something more than the mere respectability of the clergymen by whom such testimonial was signed.

The examination commenced on the 17th December, 1847; it was continued on the 18th, 20th, 21st, and 22d days of the same month, and after an interruption of some duration, the examination was renewed on the 8th March, 1848; it was continued on the 9th, and it was finally terminated on the 10th. On the 11th of that month, Mr. Gorham was informed that the bishop would decline to institute him to the living of Brampford Speke; and, on the 20th March, formal notice was delivered to him, assigning the reasons for the refusal of the bishop to be, that Mr. Gorham held unsound doctrines. There the matter rested until June, 1848, when a monition issued out of the registry of this Court on behalf of Mr. Gorham. In that monition it was stated that he, Mr. Gorham, had been presented to the living of Brampford Speke; that he had offered himself to the bishop for institution; that he was prepared to subscribe the articles required by the 36th canon, and make the declarations required by the Act of Uniformity, and to take all the necessary oaths which the law required; that although he, Mr. Gorham, was fully qualified, by age, by learning, and by the purity of his life, to be instituted to the living, yet, nevertheless, the Lord Bishop of Exeter, who was well acquainted with all the premises, and therefore ought to have admitted him to the aforesaid vicarage, or parish church, declined and refused to do right and justice in that behalf, &c. The tenor of the monition was to call upon the bishop to institute Mr. Gorham, within a certain time specified, into the vicarage, or to show cause why he should not be instituted.

The bishop appeared to the monition by proctor, and prayed to be

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heard on his petition, the object being to state the grounds on which the bishop justified his refusal to institute Mr. Gorham. To that petition Mr. Gorham gave in his answer, and a reply was then brought in on the part of the bishop. If the proceeding by plea and proof had been adopted, the Court would have had less difficulty. As the case stands, that which was stated in the course of the argument was not without foundation—that it is impossible to collect, from the manner in which the examination had been conducted, what were the real opinions of Mr. Gorham upon the subject of baptismal regeneration; which is the question before the Court. The evidence produced is most unsatisfactory, and the way in which it is brought in is still more unsatisfactory. It consists of two short affidavits, and a book annexed to the act on petition, containing one hundred and forty-nine questions addressed to Mr. Gorham, together with his answers to them, and on which the whole question before the Court turns. Now, of itself, that can scarcely be considered in the nature of evidence, strictly speaking; yet the Court is to labor through this book, and find its way among these questions and answers, in order to come to a decision whether Mr. Gorham's opinions are contrary to the doctrines of the church. I conclude, however, from the whole, as the counsel for Mr. Gorham have put it, that the question between the parties is as to the efficacy of baptismal regeneration in the case of infants only. I, therefore, dismiss from consideration altogether the question of regeneration of adults by baptism; it being admitted on the part of the bishop, that, in the case of adults, the efficacy of baptism depends on the faith and repentance of the parties baptized, and on the sincerity of their professions and promises. But, although the question was admitted to be confined to this single point, the doctrines of adult and infant baptism are so mixed up in the examination, that it is almost impossible to separate the two so as to ascertain which part of the argument applies to the one, and which to the other; and, indeed, Mr. Gorham himself says, that the baptism of adults and the baptism of infants cannot be dissevered.

The point, however, to which the consideration of the Court must be confined, is regeneration in the case of infants, and on this point the Court, I repeat, is left to find its way amongst the mass of questions and answers in the book, in order to decide what was the doctrine which Mr. Gorham asserted, and what was the doctrine imputed to him. The Court, however, is not called upon to pronounce an opinion whether the doctrine of baptismal regeneration, in the case of infants, is or is not a clearly Christian doctrine. It is not within the province of the Court to institute an inquiry of that sort; all the Court is called upon to do is, to endeavor to ascertain whether the church has determined any thing on this subject, and, having done so, to pronounce its decision accordingly. The Court is bound to administer the law as it finds it laid down, and not to give any opinion as to what the law ought to be; and therefore I am most anxious it should be perfectly understood, that, in the observations I am about to make, I shall confine myself solely to the doctrines of the church, so far as I am capable of ascertaining them, without any intention

to attempt any scriptural interpretation. Now, the first question which presented itself to the observation of the Court was, whether the church had pronounced any opinion on the point; and if so, what? And this gave rise to another question, From what source was the Court to derive any information as to the doctrines of the Church of England?

Now, the bishop of Exeter imputed to Mr. Gorham that he held and avowed opinions, on the subject of the efficacy of baptism, which were opposed to the doctrines of the church, as they were set forth in her articles and formulæ. Mr. Gorham denied this, and contended that his opinions were in exact conformity with those of the Church of England, as contained in her articles, and in perfect accordance with the intentions of the formulæ of the church. Now, a great deal of learning and ingenious argument has been applied to the discussion of this part of the case, as was naturally to be expected from the bearing it might possibly have on the ultimate decision of the question by the Court. Mr. Gorham declared that he took his stand principally on the articles, and that he would not be driven from them; that he would go so far only as the church had expressed an opinion, and that when the church was silent he would not speak. Mr. Gorham, then, took his stand on the articles of the Church of England. That being so, the next points to be considered are the questions addressed to Mr. Gorham by the bishop; and I think the very first question addressed by the bishop to Mr. Gorham will throw some light on the cause of the protracted length of the examination to which Mr. Gorham has been subjected, and to the very particular and precise manner in which the bishop was obliged to frame his questions, in order to obtain from Mr. Gorham direct and specific answers to them. The first of those questions, which appears in page 63 of the book, was: "Prove from Scripture that baptism and the supper of the Lord are severally necessary to salvation: first, of baptism; secondly, of the Lord's supper." That was the question; that was the mode in which the bishop put the question, first, of baptism; secondly, of the Lord's supper. Here it clearly appeared that the bishop had not put the question in the form which would be likely to draw out a specific answer as to the doctrine of the church with regard to the necessity of the sacraments of baptism and the Lord's supper.

Mr. Gorham was perfectly well aware of the slip the bishop had made, and the learned counsel have taken advantage of that slip so made by the bishop, when they showed that his lordship was obliged to correct his error in the next question. Now, to this first question, Mr. Gorham answered, and truly answered, "I do not find in Scripture that the necessity of baptism to salvation is declared in terms so absolute as this proposition." Then came a long discussion upon the question of baptism, in which Mr. Gorham referred to the words of Scripture, "Except a man be born of water and of the Spirit, he cannot enter into the kingdom of God," and said, "If the allusion be to baptism, (which, however, had not then been instituted,) it undoubtedly affirms the necessity of complying with that solemn insti-

tution, where no unavoidable impediment intervenes. Having been ordained of Christ, it cannot be slighted without the awful consequences of disobedience to His express commands. But it does not appear to me, that the being 'born of water,' and the being 'born of the Spirit,' are so indissolubly tied together by this declaration, that each is equally and in the same sense necessary to salvation. This view is confirmed by the fact, that the expression 'born again' is used in this discourse, in verses 3, 6, 7, and 8, without any reference to being 'born of water,' but twice with express mention of being 'born of the Spirit,' as the great essential requisite. It is confirmed also by verses 16 and 17, where 'everlasting life' and salvation are positively connected with 'belief' in the Son of God, without reference to baptism; as if for the very purpose of showing that faith is an indispensable and essential condition, but that baptism is only generally necessary, a condition to be dutifully performed. Precisely the same conclusion must be drawn from the terms used by our Lord in his express institution of baptism, 'He that believeth and is baptized shall be saved.' (Mark xvi. 16.) The general connection between the sign which He has ordained for admission into his church, and the faith which that sign certifies, is here distinctly affirmed. But our Lord adds, 'He that believeth not shall be damned.' Here exclusion from everlasting salvation is grounded, not on the omission of baptism, but on the withholding belief in the Son of God."

Then he went on to say, "The participation of the supper of the Lord is stated in Scripture in the same manner as generally necessary, not essentially requisite, to salvation." Now, the manner in which this answer was given showed the bishop he must be precise in putting his questions; and, accordingly, he proceeded, in the next question, to say, "Does our church hold, and do you hold, that baptism and the supper of the Lord are generally necessary to salvation, in terms as absolute as this proposition?" Answer: "Our church does hold this doctrine, and I hold it, of course." The third question was: "Does our church hold, and do you hold, that by the express words of our Lord, 'Except a man be born of water and of the Spirit he cannot enter into the kingdom of God,' we may perceive the great necessity of the sacrament of baptism, where it may be had?" The answer was: "The church states this in her service for adult baptism." Then he referred to the 36th canon, and concluded by saying, "Your Lordship has already had my subscription to this acknowledgment on my institution to St. Just, for my assent to the whole Book of Common Prayer includes my assent to this part of it." In the fourth question he was asked: "In the homily of Common Prayer and the Sacrament it is said, that, 'according to the exact signification of a sacrament baptism and the supper of the Lord are visible signs, expressly commanded in the New Testament, whereunto is annexed the promise of free forgiveness of our sins, and of our holiness and joining in Christ.' Do you hold this to be godly and wholesome doctrine?" His answer was: "My subscription to the articles, and among them to the 35th, appears to me to involve a sufficient reply to this question. I prefer, and I claim the privilege of giving my assent to the two Books of

Homilies generally, as containing 'a godly and wholesome doctrine, and necessary for these times,' to my basing any particular doctrine upon any detached sentence taken out of those books. In claiming this privilege, I by no means intended to intimate that I 'assent with reserve' to this passage. On the contrary, I consider it as expressing a wholesome truth, when fairly construed; but, as it has been often adduced, in controversies on the efficacy of the sacraments, in a sense in which I do not believe the compiler of that excellent homily to have written it, my consent could not be given to it by a naked affirmative without explanatory matter. Consecutive questions, framed with a bearing on a particular controversy, replied to without many collateral explanations, might elicit apparent, and only apparent, admissions which would not correctly represent the doctrine of the church. To prevent the possibility of misapprehension as to my reply to this passage, or others to which I may have to return a similar answer, I add, that I fully assent to the wholesome truth contained in this quotation, when fairly brought into connection with the articles of our church, on the nature and efficacy of the sacraments." The words "articles of our church" were printed in capitals, as showing that Mr. Gorham stood upon the articles as the standard of his opinions.

Then followed the questions which raised the point now under the consideration of the Court. The fifth, sixth, and seventh questions were put by the bishop in this manner: 5. "Does our church hold, and do you hold, that every infant baptized by a lawful minister, with water, in the name of the Father, and of the Son, and of the Holy Ghost, is made by God, in such baptism, a member of Christ, a child of God, and an inheritor of the kingdom of heaven?" 6. "Does our church hold, and do you hold, that such children, by the laver of regeneration in baptism, are received into the number of the children of God and heirs of everlasting life?" 7. "Does our church hold, and do you hold, that all infants so baptized are born of water and of the Holy Ghost?" Mr. Gorham answered: "As these three questions all imply the same description of answer, I will discuss them together; and, generally, I reply, that these propositions, being stated in the precise words of the ritual services, or of the catechism, 'undoubtedly must be held, by every honest member of the church, to contain in them nothing contrary to the Word of God, or to sound doctrine, or which a godly man may not, with a good conscience, use and submit unto, or which is not fairly defensible; . . . if it shall be allowed such just and favorable construction as in common equity ought to be allowed to all human writings, especially such as are set forth by authority.' (Preface to the Book of Common Prayer.)"

Now, here, it appears that Mr. Gorham did not give a precise answer to the questions which were proposed to him. He answered, that the propositions contained nothing contrary to the Word of God, or to sound doctrine, or which a godly man might not, with a good conscience, use and submit unto, or which was not fairly defensible; but then he qualified it by saying, "If it shall be allowed such just and favorable construction as in common equity ought to be allowed to

all human writings, especially such as are set forth by authority." Then he said, "The 'just and favorable construction' of passages like these, (occurring in services intended for general use,) which taken in their naked verblatity might appear to contradict the clearest statements of Scripture and of the church herself, must be sought chiefly, first, by bringing them into juxtaposition with the precise and dogmatical teaching of the church in her explicit standard of doctrine, the Thirty-nine Articles; in the next place, secondly, by comparing the various parts of her formularies with each other; and collaterally, thirdly, by ascertaining the views of those by whom her services were reformed and her articles sanctioned."

Here, then, arose a very important question — whether the opinions and views of "those by whom our church services were reformed and her articles sanctioned" could be taken to give a construction to words, which, by their import, and general and common acceptation, bore a different construction from that of the individual reformers; or, in other words, whether the opinions of the individual reformers could be taken in opposition to the precise and plain declarations which were made in the formularies and articles of the church. This formed a great part of the discussion in the case on behalf of Mr. Gorham, and much learning was displayed for the purpose of showing what were the opinions of the reformers of the church, by which opinions, as was contended, the formularies of the church must be construed; that the reformers were Calvinists; that they entertained Calvinistic opinions; that, as they did so, the articles framed by them must be construed with relation to Calvinistic principles; that they must be supposed to have been governed by those principles in drawing up the formularies and ritual of the church; and that, whatever the expressions made use of, they must be taken in the Calvinistic sense, and not in the sense to which their plain import and signification to a common understanding would lead. The Court will not, however, further allude to this question at present, but must content itself with having stated the meaning of Mr. Gorham and his counsel, that one mode of ascertaining the construction to be put upon the articles of the church would be the views of those by whom the articles were sanctioned.

Then Mr. Gorham went on to explain his views as to the points contained in these three questions: but it is not necessary to follow him through his different statements, and the purpose for which I have referred to them now is to show what was the question which the bishop proposed to raise—confining it to the question of infant baptism, and not extending it to the baptism of adults. Looking at the mode in which the opinions of the church were to be ascertained, no one could doubt that the Thirty-nine Articles should first be consulted, and if they were not silent upon any particular point, and if the words made use of were not doubtful, then there would be no occasion to search further. The learned counsel here quoted the opinions of Rogers: "The purpose of our church is best known by the doctrine which she doth profess, the doctrine by the Thirty-nine Articles established by act of Parliament, the articles by the words whereby they are ex-

pressed." To the same effect were the passages quoted from other writers — from Bishop Hall, from Bishop Burnet, and from Archbishop Whitgift. A quotation was also made from Bishop Prideaux, which went to show that the doctrine of the Church of England was contained in the Thirty-nine Articles, and that, whatever the opinions of private persons might be, this was the standard by which the sense of the church was to be taken.

Prima facie, then, the Thirty-nine Articles were the standard of doctrine: they were framed for the express purpose of preventing diversity of opinion; and certainly they are first to be considered and applied to in endeavoring to ascertain the doctrine of the church. But if they fall short or are silent on any particular point, what, then, shall be resorted to? Shall we resort to the opinions of those by whom the articles have been framed, or to other declarations of the church? It had been most clearly and distinctly stated, upon the high authority of Bishop Burnet, that the truest indication of the sense of the church was to be taken from her language in her public offices, that the doctrines of the church were best understood by her formularies; and the same observation was made by Dr. Waterland. They both agreed that this was the true criterion by which doubtful or ambiguous expressions were to be construed. I may add, that the same rule was laid down by Lord Brougham, in delivering the opinion of the Judicial Committee of Privy Council in the case of *Escott v. Mastin*, 4 Moo. P. C. C. 102. That opinion showed that the public declarations of the church were to be the test, and that the private opinions of individuals, however eminent for their piety, learning, and station, were not to have any weight with the Court. Under those circumstances came the question, Was there any thing doubtful in the present case, upon which it was necessary to refer to other authority than the Thirty-nine Articles? The 25th article was that into which the Court was now to inquire. It is stated, that "sacraments ordained of Christ be not only badges or tokens of Christian men's professions, but rather they be certain sure witnesses and effectual signs of grace and God's good will towards us, by the which He doth work invisibly in us, and doth not only quicken, but also strengthen and confirm our faith in him. There are two sacraments ordained of Christ our Lord in the gospel, that is to say, baptism and the supper of the Lord." And, "the sacraments were not ordained of Christ to be gazed upon, or to be carried about, but that we should duly use them: and in such only as worthily receive the same they have a wholesome effect or operation; but they that receive them unworthily, purchase to themselves damnation, as St. Paul saith." It has been suggested that this simply applied to the sacrament of the Lord's supper; but I will take it to apply to both, inasmuch as the worthy reception was, according to the doctrine of the church, equally necessary to the reception of baptism as to the supper of the Lord. But here the article left it doubtful what a worthy reception was. "Faith and repentance," said Mr. Gorham, "were requisites to the reception of baptism as well as the Lord's supper;" but that was not to be found laid down in this article; it

must, therefore, be found elsewhere. The 27th article stated, that "baptism is only a sign of profession and mark of difference, whereby Christian men are discerned from others that be not christened; but it is also a sign of regeneration, or new birth, whereby, as by an instrument, they that receive baptism rightly are grafted into the church; the promises of forgiveness of sin, and of our adoption to be the sons of God by the Holy Ghost, are visibly signed and sealed; faith is confirmed, and grace increased, by virtue of prayer unto God." And the article concluded thus: "The baptism of young children is in any wise to be retained in the church, as most agreeable with the institution of Christ."

Now, the first difficulty that arose here was, if faith was to be confirmed, and grace increased, by virtue of prayer to God, how was it that young children were to be baptized? They had neither faith nor repentance: they could not have faith, because they knew not the promises: they could not have repented, because they had no actual sin. So that it was upon a comparison of these two articles that the doubt arose; and this doubt is to be solved by reference to some other authority. What, then, is that authority to be? I apprehend, that what I have already stated is sufficient to dispose of this, and that the declarations of the church must be resorted to for an explanation of what was meant by worthy reception, regeneration, and the direction that the baptism of young children should be retained, as most agreeable with the institution of Christ, of how young children were to be grafted into the church, and to whom the promises of forgiveness of sin, and adoption to be the sons of God by the Holy Ghost, were visibly signed and sealed.

Mr. Gorham contended, and it was insisted upon by his counsel, that children born in sin could not be worthy recipients, and could not receive the rite with any beneficial effect. His fifteenth answer was: "Our church holds, and I hold, that no spiritual grace is conveyed in baptism, except to worthy recipients; and as infants are by nature unworthy recipients, being born in sin, and the children of wrath, they cannot receive any benefit from baptism, except there shall have been a preventient act of grace to make them worthy. Baptism is the sign or seal, either of the grace already given, or of the repentance and faith, which are stipulated, and must be hereafter exercised." The eighteenth question was: "Has the church not declared her mind, that infants, baptized by a lawful minister in the name of the Father, and of the Son, and of the Holy Ghost, do receive the spiritual grace of baptism, even if they have not entered into the stipulations by their representatives?" And the answer was: "The church has declared, that to infants privately baptized the grace and mercy of Christ is not denied. In this case of emergency, I consider that the stipulations, though not formally made by sponsors, are made by implication, through those who earnestly desire their baptism, and by the person who administers it, which implied stipulations the church requires to be formally adopted as soon as circumstances will suffer it. The case of 'present exigence' cannot, therefore, be fairly urged as an exception to the requirements of the church." The bishop fol-

lowed up this with another question: "Does the church hold, and do you hold, that infants so baptized are regenerated, independently of the stipulation made by their representatives, or by any others for them?" Mr. Gorham answered: "If such infants die before they commit 'actual sin,' the church holds, and I hold, that they are undoubtedly saved; and, therefore, they must have been regenerated by an act of grace prevenient to their baptism, in order to make them worthy recipients of that sacrament. This case is ruled by the church. But if the infant lives to a period in which it can commit actual sin, the declaration of the regeneration must be construed according to the hypothetical principle, which I have stated in my replies to questions 5, 6, and 7." His position is, that it is not through baptism that the grace is confirmed. Here, then, the authorities must be looked into upon which the Court is to rely.

The first authority, which is naturally that to which attention must be directed, is undoubtedly the Public Office of Baptism for Infants. Mr. Gorham's position with respect to this is, that this administration of the sacrament of baptism is to be considered either as hypothetical upon the fulfilment of certain promises by the sureties, or dependent upon a prevenient act of grace, or as a charitable hope on the part of the church. In entering upon this inquiry, the first thing that strikes our attention is the encouragement which is given to the parents of the child to be baptized to have the rite performed as early as possible, showing that the early performance of it is of very high importance. It directs that they are "to be admonished," &c. (Preface to the Service for the Public Baptism of Infants.) The service commences with the question, "Hath this child been already baptized, or no?" If the answer is in the negative, the priest exhorts those assembled to this effect: "Dearly beloved, forasmuch as all men are conceived and born in sin," &c. The child is born in sin, and the mode of release is by baptism with water and with the Holy Ghost. The priest next offers up the following prayer: "Almighty and everlasting God, who of thy great mercy," &c. Here, therefore, is the prayer on behalf of the child, that he is to be washed and sanctified with the Holy Ghost. Then follows another prayer: "Almighty and immortal God, the aid of all that need," &c. That which is asked is not baptismal or sacramental regeneration, but spiritual regeneration. After this prayer, the gospel, taken from Mark x. 13, is read. It refers to the blessing which our Savior bestowed upon the children who were brought to him. After the gospel is read, the minister again exhorts the people, saying, "Beloved, ye hear in this gospel the words of our Savior Christ," &c. This address to the congregation concludes with a thanksgiving to Almighty God. The priest then addresses the godfathers and godmothers to the following effect: "Dearly beloved, ye have brought this child here to be baptized," &c. Various questions are then asked the godfathers and godmothers, and their answers to them are received. Then follows the prayer for the sanctification of the water, which is in these words: "Sanctify this water to the mystical washing away of sin, and grant that this child, now to be baptized therein, may receive the fulness of thy grace, and ever remain in the number of thy faithful and elect children, through Jesus Christ our Lord. Amen." The

attention of the Court was called to this expression, "the mystical washing away of sin," as implying that it was not an actual, but a mystical, washing away of sin; or, as it was afterwards expressed, a sacramental washing away of sin. I do not exactly feel the force of that reasoning. The mystical washing away of sin is something beyond that which meets the eye. After the child is baptized, the priest signs him with the sign of the cross. This done, he addresses the congregation thus: "Seeing now, dearly beloved brethren, that this child is regenerate," &c. The Lord's Prayer follows next; after which the priest says: "We yield thee hearty thanks, most merciful Father, that it hath pleased thee to regenerate this infant with thy Holy Spirit, to receive him for thy own child by adoption, and to incorporate him into thy holy church." In other words, we have prayed that this child might be regenerated with the Holy Spirit, and we now return thanks to God for having been pleased to grant that request. We have prayed to God to receive this child as his own by adoption, and he has answered that prayer, for which we also return Him thanks. Finally, we have prayed that the child might be incorporated into the church of God, and we also return thanks that this prayer has also been answered. The prayer then concludes as follows: "And humbly we beseech Thee to grant that he, being dead unto sin, and living unto righteousness, and being buried with Christ in His death, may crucify the old man, and utterly abolish the whole body of sin; and that, as he is made partaker of the death of thy Son, he may be also partaker of His resurrection: so that, finally, with the residue of thy holy church, he may be an inheritor of thine everlasting kingdom, through Christ our Lord. Amen."

Now, it is said that all this is hypothetical — that it is all upon the hypothesis, that the child will do every thing which has been promised for him. I must confess that this does not seem to me to be the true construction. The declaration of the church is positive, and we must confine ourselves to the case of infants; because it is admitted on all hands, that, in the case of adults, the declarations are all upon the hypothesis, that the adults are sincere in their professions of faith and repentance — that they do intend to perform what they promise. The declarations in the Office for the Public Baptism of Infants are clear and distinct. A prayer is offered for the regeneration of the Holy Spirit, and a declaration is also made, that the child has been, and is, regenerate. The service concludes with various instructions to the godfathers and godmothers. It is suggested, that the child will hereafter perform what has been promised for him, and that that is the reason for admitting children to baptism; or, in other words, that the church proceeds on the assumption, that, in after-life, when they come to years of discretion, — when they are in a capacity to know and understand the principles of that religion and of that church into which they have been ingrafted, — the hypothesis, the charitable doctrine of the church, is, that they will perform the engagements made for them at their baptism. It was contended by the learned counsel, that the case of private baptism was a case of emergency, and that, in the absence of godfathers and godmothers,

nothing in respect to the efficacy of baptism could be drawn from that formula.

Now, I confess, I differ in opinion from the learned counsel. If it was a case of emergency, was it not then a case in which the church intended to declare, that the child so baptized was entitled to all the benefits that the infant, who was baptized in full health, and with the performance of the whole service, would be entitled to upon his baptism? Otherwise, why does the church declare, that as many prayers as the exigency of the case will suffer are to be made use of? I think there may be something in what the learned counsel for the Bishop of Exeter says, viz., that, if this were not so, surely the child ought to be re-baptized; for it cannot receive those benefits unless its baptism be deemed sufficient. It is said that the church is anxious to put the public and private baptism of infants on the same footing; for the direction of the rubric is, that "if the child privately baptized lives, it is expedient that it is brought into the church, to the intent, that, if the minister of the same parish did himself baptize that child, the congregation may be certified of the true form of baptism by him privately before used." But if the child has been baptized by any other lawful minister, certain questions are to be addressed to those who bring the child, viz., "By whom was this child baptized?" &c. The matter and the words, therefore, are here considered essential parts of the baptism. Now, if the answers given to the minister prove that all things have been properly done, he shall not christen the child again, but shall receive him as one of the flock of true Christian people; showing, therefore, that the essential part of the baptism is the water and the words; and the certificate, which is not the certificate of the minister, but of the church, is in these words: "I certify you that in this case all is well done," &c. Here is a declaration, positive and precise, that this child, so baptized in the name of the Father, of the Son, and of the Holy Ghost, is received into the number of the children of God, and has become an heir of everlasting life.

What room is there, then, for stating that the baptism of infants was founded upon an hypothesis? True, if the child afterwards committed actual sin, he might lose the benefits of his baptism, and require faith and repentance for his regeneration or renovation; but here was the express declaration of the church, that children, who were baptized, dying before they committed actual sin, were undoubtedly saved. Adults, however, must, when baptized, be sincere in their intentions to fulfil all their engagements, or else they would not have received the rite worthily; but infants were saved if they died before committing actual sin. The two services,—that for adults and that for infants,—are essentially and substantially distinct. When the child is asked in the catechism, who gave him his name, he replies, it was given him by his godfathers and godmothers in baptism, wherein he was made an inheritor of eternal life; and the child afterwards returns thanks to the Almighty for having thus called him to a state of salvation. The church declares that two sacraments only are necessary to salvation, "the Lord's Supper and Baptism, which are the outward and visible signs of inward spiritual grace," and defines the inward

and spiritual grace of baptism to be "a death unto sin, and a new birth unto righteousness, whereby we are made the children of grace." After the child has been baptized, he is confirmed by the bishop, that he may, with his own mouth, take upon himself what his godfathers and godmothers had promised for him; and the prayer, in so many words, sought the blessing of God on those children who had been regenerated in baptism by the Holy Ghost, and whose sins were all forgiven. From all the quotations I have read, it appears to me that the doctrine of regeneration is not at all hypothetical, but a doctrine clearly taught by the church. But what is meant by the term "regeneration"? It is plainly by water and the communication of the grace of the Holy Ghost. It appears to me that regeneration does not mean such a change of state as would almost amount to justification, from which the person so regenerated would never finally fall; but that it means such a change of state and character that he was converted from a child of wrath to a child of grace, and made a member of Christ, a child of God, and an inheritor of the kingdom of heaven. True he was called a child of God, but he might fall away and commit sin, and persist in that sin, and die without faith and repentance, in which case the benefit of baptism would be lost; but in the case of those who died after baptism, and before committing actual sin, they were saved. The Court, therefore, upon this part of the case, entertains no doubt that the infant is regenerated in and through the medium of baptism. Now, this being so, what is the next question to be considered by the Court? Reference is made to the Burial Service, as being founded on the hypothesis that the person who died was taken to God, that the body was committed to the earth, in sure and certain hope of everlasting life. The church necessarily assumes that the deceased has been taken by God to himself; which I apprehend to mean, that he has been removed from the world in which he had been living, whether in a state of repentance or not, of which the church cannot judge, but that he has been removed from the possibility of committing actual sin, as we are told in another part of the service, where it says, "as our hope is that this our brother doth." This is founded on the hope that the person has repented of his sins. The church cannot judge of the person who has died, whether he was or was not a penitent sinner, whether he is to be eventually received into the kingdom of heaven, or whether he is to suffer the punishment of his sins and transgressions; but her hope is, that he has repented of those sins and transgressions.

But then it is said, that when the clergyman has subscribed the articles, and given his unfeigned assent and consent to all that is contained in the Book of Common Prayer, the person only gives his assent and consent to the use of it, and that he does not thereby pledge himself to hold any particular doctrine; but I apprehend, that, if a person gives his assent and consent to a thing, he acknowledges the truth of it, and cannot excuse himself by such a plea; that he believes the articles are founded on the Word of God, and the Prayer-book contains nothing contrary to the articles, which are founded on the Scriptures. Therefore the Prayer-book contains nothing what-

ever which can in any way be considered in opposition to the articles. But then the question arises—and a very important question it is, and one which occupied a great portion of the time in argument of the learned counsel—Were not the reformers themselves Calvinists? Did they not embrace Calvinistic principles? And, therefore, could they be understood to declare, in such positive terms as are to be found in the sacramental services, that children are regenerated in baptism? Now, it has been questioned whether Cranmer did not change his opinions with regard to baptism, and I think the learned counsel has very successfully argued the point, by showing that Cranmer did change them, and, having been brought up as a Roman Catholic, must necessarily have done so. Whether the reformers embraced the doctrines of Calvin is not, I think, a matter of dispute. Undoubtedly it cannot be denied that the doctrines of Calvin made a certain progress in this country in the times of Cranmer and Latimer, and that many persons, probably some of the reformers, to a certain degree, embraced those doctrines. But to what extent? Did they go as far as predestination and election, and final perseverance and reprobation? Calvin did, and we are told that Cranmer's principles and opinions are to be judged of, in a great measure, by those with whom he associated, and that, consequently, he was responsible for the opinions of Martin Bucer and Peter Martyr, who were placed by him in the chairs of Oxford and Cambridge; these men being intimate acquaintances of Calvin and Archbishop Cranmer, by whom they were invited to this country, to carry on the work of reformation. Now, how far did they act on the principles of Calvin? The learned counsel said, that in his opinion the 17th article determined this question. That article relates to predestination and election. It asserts that "predestination to life is the everlasting purpose of God, whereby (before the foundations of the world were laid) He hath constantly decreed, by his counsel secret to us, to deliver from curse and damnation those whom He hath chosen in Christ out of mankind, and to bring them by Christ to everlasting salvation, as vessels made to honor. Wherefore they, which be endued with so excellent a benefit of God, be called according to God's purpose, by His Spirit working in due season: they through grace obey the calling; they be justified freely; they be made sons of God by adoption; they be made like the image of His only begotten Son Jesus Christ; they walk religiously in good works; and at length, by God's mercy, they attain to everlasting felicity.

"As the godly consideration of predestination, and our election in Christ, is full of sweet, pleasant, and unspeakable comfort to godly persons, and such as feel in themselves the working of the Spirit of Christ, mortifying the works of the flesh and their earthly members, and drawing up their mind to high and heavenly things, as well because it doth greatly establish and confirm their faith of eternal salvation to be enjoyed through Christ, as because it doth fervently kindle their love towards God"—it might be supposed that the reformers would have gone on to declare this to be an article of the faith; but, instead of that, what do they declare?—"So for curious and carnal persons, lacking the Spirit of Christ, to have continually

before their eyes the sentence of God's predestination, is a most dangerous downfall, whereby the devil doth thrust them either into desperation, or into wretchedness of most unclean living no less perilous than desperation. Furthermore, we must receive God's promises in such wise as they be generally set forth to us in holy Scripture; and in our doings that will of God is to be followed which we have expressly declared unto us in the Word of God." So that they assert nothing with regard to the doctrine of predestination and election. The question here is left open; the reformers declare nothing—they do not declare it to be an article of faith, but leave the matter undecided. I think, if they had intended to settle the matter, they would have expressed themselves in terms in which there could have been no doubt. They could not, I apprehend, be ignorant of words to express their meaning. To what extent, then, were the doctrines of Calvin taken? They were taken to the extent that they were held by Bishop Hopkins. Bishop Hopkins says, "God promises pardon and remission of sins to all that believe and repent, but He promises grace to believe and repent only to those whom, by His absolute covenant, He is engaged to lead to grace and repentance." Did Ridley, and Latimer, and Cranmer go so far as this? or did they go to the same extent as the Synod of Dort? In the sixth article of the Synod of Dort is this statement: "*Secundum quod decretum electorum corda quantumvis dura, gratiose emollit, et ad credendum inflectit, non-electos, ante justo judicio suæ malitiæ, et duritiæ relinquit.*" "There are certain persons of the elect whose hearts are to be softened and turned to the true faith, but those who are not among the number of the elect are to be left to their own wickedness and hardness of heart." Was that the doctrine of Cranmer, or Latimer, or Ridley? Then again, in the seventh article of the Synod of Dort—"Est autem electio immutabile Dei propositum, quo ante jacta mundi fundamenta ex universo genere humano, ex primæva integritate in peccatum et exitium sua culpa prolapsa, secundum liberrimum voluntatis suæ beneplacitum, ex mera gratia, certam quorundam hominum multitudinem, aliis nec meliorum, nec digniorum, sed in communi miseria cum aliis jacentium, ad salutem elegit in Christo," &c. These are the doctrines of Calvin, as set forth in his "Institutes."

How is it possible that Cranmer and Latimer should have adopted these principles, and expressed themselves in the terms I have mentioned—that children, when baptized, are regenerated, and that, if they die before they commit actual sin, they are saved, according to God's word? Is it maintained that none but the elect are to have the power of faith and repentance granted to them? Some persons have said so, but Mr. Gorham does not come within the number of those persons. Mr. Gorham does not say that this applies only to some children—to those children that are elect, and not to all children. Mr. Gorham says, "Our church has determined that children who are baptized, and who die not committing actual sin, are undoubtedly saved;" but then Mr. Gorham will not allow regeneration in baptism; he says, "That is, by prevenient grace, with-

out which they cannot be worthy recipients." But, with regard to the position of the learned counsel, that the reformers were Calvinists, and that, therefore, these declarations must be taken in a Calvinistic sense—that you must not give the words their general meaning, but must consider that they were speaking only of those who were the elect, to whom alone the grace of repentance and faith could be extended—I apprehend that this is not only not applicable to the baptismal service, but goes to the root of religion altogether; for if the doctrines of election, predestination, and reprobation are to be the faith of the church, what necessity is there for prayer? What encouragement is there for a person to believe in God, if he is assured that long before his birth his fate was determined by the irrevocable decree of God, either for eternal happiness or eternal misery? But that would be the state of the case, if such were the doctrine of the church.

Again, when it is said that God has promised forgiveness of sins to all who truly repent, is that statement to be limited to those who are among the number of the elect, who alone are to have grace and repentance? This appears to me to be a contradiction to the whole structure of our Common Prayer, the whole drift of which is to encourage faith and repentance, with the hope of forgiveness of sins. "If the wicked man turneth away from his wickedness which he hath committed, and doeth that which is lawful and right, he shall save his soul alive." And yet the wicked man cannot turn away from his sins, cannot repent of what he has done, because he is not of the number of the elect! The declaration is express, and our Prayer-book incorporates it into its services. For instance, in the absolution, at the commencement of the service: "He pardoneth and absolveth all them that truly repent, and unfeignedly believe His holy gospel." And so in all the other services, which are of universal application to all who truly repent, not confining its privileges to those who are among the number of the elect, whose faith was fixed and determined, and that long before they came into existence. Now, was this doctrine the doctrine of either Ridley, Latimer, or Cranmer? It may have been—probably it was embraced by all the reformers; but did they declare it in any of their services, or in the articles, or in any part of the Book of Common Prayer? I apprehend, most clearly and decidedly not. As to the 17th article, it is admitted on all hands not to have determined the question; so that if persons do persist in alleging that election, predestination, and reprobation were held by the reformers, it is certain that they have not, connectedly as a body, expressed their decided opinions upon it. So that their evidence is to be regarded merely as that of private individuals—no doubt most eminent men—men, eminent for their learning, their piety, and their knowledge of the Scriptures; and if the Court were now to set about erecting a new statute of faith for itself, and for the church, undoubtedly the opinions of these persons would weigh with the Court, and the Court would pay attention to all that has been said by all those persons whose writings were cited by the learned counsel.

It is, however, admitted on the other hand, that there are persons of great weight, learning, and authority, who differ in opinion from those learned and pious writers to whom the learned counsel adverted. What, then, is to determine the question? The method is not to enter on a question as to the comparative weight of these persons — not to examine their writings in order to find out certain passages which may not entirely agree with those quoted by the learned counsel. I believe the learned counsel did candidly acknowledge that there were several instances in which various passages in the same person's writings could not be made to agree with each other; and every one must be aware of this. The Court would be left in the greatest difficulty if it were left to determine upon isolated passages, selected from these various authors, in order to establish the doctrines of election and predestination as the doctrines of the church.

There are, undoubtedly, very high authorities which go to express their opinions on this subject. I do not think, however, that Cranmer can be held responsible for all that Martyr and Bucer chose to say and publish. I think there is too much laid upon the shoulders of the archbishop; but generally he concurred in their sentiments, and he called them in to assist him in the compilation of the Book of Common Prayer. That book is nearly the same as the second book of King Edward VI., prepared by convocation, and established by act of Parliament. How could these persons have done this if they believed in the doctrines of predestination and election, which doctrines are not contained in the Book of Common Prayer? Up to a certain time it was the opinion of the German reformers; but Bishop Burnet says, in his "History of the Reformation," vol. 2, p. 233, speaking of the doctrine of Calvin, which was said to have been the doctrine of the early reformers, "The Germans soon saw the ill effect of this doctrine. Luther changed his mind about it, and Melancthon openly wrote against it; and since that time the whole stream of the Lutheran churches has run the other way. But both Calvin and Bucer were still for maintaining the doctrines of these decrees; only they warned the people not to think much of them, since they were secrets which men could not penetrate into." This seems to be a good reason why they did not proclaim the doctrine as a rule of faith for the Church of England, but left the subject entirely open.

It may also be admitted, that, in the latter part of the reign of Queen Elizabeth, the doctrines of Calvin had obtained a much stronger hold upon the minds of the people of this country than they had done previously, and that many eminent persons might be referred to who had embraced this doctrine of predestination and election; but then it must be recollected that the articles of 1562 were the same in fact and substance, though with some verbal alterations, as the articles of 1552. Upon this doctrine of baptism, I apprehend, there is nothing upon which they disagree. Afterwards there was an alteration made, for in one of the articles there was a declaration of the church with respect to the salvation of infants who are bap-

tized, and who die before they commit actual sin. That was afterwards inserted at the conclusion of the Service for the Public Baptism of Infants. But what I wish more particularly to allude to is this — that at the end of the clause to which I have referred, the words “and not else” were added. The interpretation was, that if children were baptized, and died without committing actual sin, they were saved, but not else. However, the damnatory clause (if so it may be termed) was left out, and it is, consequently, not now the doctrine of the Church of England, that baptism is absolutely necessary to salvation. (Burn. Reform. vol. 1, part 11, p. 463.)

The opinions of many authorities to which the learned counsel referred went to show, that it was not the want of the sacrament that would deprive the person of its benefit, but the neglect and contempt of it where it could be had. The strong ground taken by the learned counsel is, that, the reformers being Calvinists, the doctrines of the church, as prepared and framed by them, must be considered as Calvinistic. Then show me how far they advocate those doctrines in the public acts of the church. Their private opinions I cannot enter into, because the Court is bound down to consider the true import of the words in the several services and in the articles. We cannot search into how far each individual went in the acknowledgment of those doctrines. The Court must determine upon the general acts of the church, publicly declared as the acts of a body, and not the acts of individuals. Now, I have said, that in the latter part of Queen Elizabeth's reign, these doctrines had taken strong possession of the minds of the people of this country. We know that between the reign of Edward VI. and the accession of Queen Elizabeth, in the reign of Queen Mary, a large number of Protestants went into Germany, and came into communication with the German reformers, and imbibed their principles, to a certain degree, during their residence there, and undoubtedly they did thus obtain very strong impressions in favor of the doctrines of Calvin. But still, these doctrines were not received here generally in 1562. Upon this part of the case, however, I am of opinion that the private opinions of these parties are not to be taken; they have no public bearing, and can have no public effect — they can throw no light upon the subject. If the words to be considered were doubtful and ambiguous, and could not be construed by reference to any other of the services of the church, or by any other of the public acts of the church, then, indeed, it would be right and proper to advert to those persons; but, so long as the articles and services of the church are reconcilable, and not only reconcilable, but necessarily consistent with the literal interpretation of the words, you are not at liberty to put any private interpretation upon them.

Now, this will, I think, as far as the Court is concerned, dispose of this part of the question. Of course, I protest against going through all the authorities which have been very properly cited by the learned counsel. I have not the means of doing so, and I do not see the necessity for it. I am not aware that it is necessary for me to occupy much more time upon the questions which have arisen here. One

In re Edwards.

point to be ascertained is, whether the doctrine of the Church of England is that of baptismal regeneration in the case of infants, or not. Another point is — does Mr. Gorham oppose — as it is quite clear, from the passages I have read from his evidence, and from the whole tenor of his examination, and the learned counsel's argument upon it, that he does oppose — baptismal regeneration in infants? He says, "The child may receive, and must receive, an act of grace before he receive the sacrament to good effect; but that is an act of grace not conferred in or by baptism, though it may take place before baptism, at baptism, or after baptism." But, I say, undoubtedly the church has declared it to be so, because, though the words may appear to have a reference to the Romish doctrine — to the *opus operatum* — yet it is plain that children receive spiritual regeneration, according to the words of the formulary of the church. Spiritual regeneration is prayed for, and thanks are given for spiritual regeneration. Therefore, I say, if this be the doctrine of the Church of England, as undoubtedly it is declared to be, that children are regenerated at baptism, and are saved if they die without committing actual sin, Mr. Gorham does not hold it. Then, has the bishop showed cause why he should not institute him to the benefice? I am clearly of opinion that he has shown sufficient cause why he should not institute him to the benefice; consequently the bishop must be dismissed with costs.

Prerogative Court.

In the Goods of EDWARDS.¹

November 16, 1850.

Administration — Revocation.

Administration was granted describing the deceased as a widower; the administration was revoked on its being discovered he had left a widow, who had been before his death, and still was, resident in New Zealand.

On the 16th October, 1850, letters of administration of the goods of William Edwards, who died on the 3d May, 1850, were granted, under seal of the Court, to William Edwards, one of his natural and lawful children, in which administration the deceased was described as a widower, the administration having so described him through error. It appeared, on affidavit, that J. Edwards, the widow of the deceased, had left him in October, 1848, and gone to New Zealand, where she was still residing, and not likely to return to this country. The administrator, on discovering his error, immediately returned the administration to the proctor, for the purpose of having the mistake corrected.

¹ 14 Jur. 1124.

In re Redding.

R. Phillimore applied to the Court for leave to alter the administration, by striking out the word "widower," a new bond being first given by the administrator; but

SIR H. JENNER FUST directed the administration to be revoked.

Prerogative Court.

In the Goods of REDDING, otherwise HIGGINS.¹

November 16, 1850.

Will — Revocation.

The deceased duly executed her will, using the name "Higgins" in the body of the will and in the signature. Subsequently the writer of the will, by her directions, erased the name "Higgins," and substituted that of "Redding," and the deceased re-signed the will, using the name "Redding," but there was no re-execution:—

Held, that, in the absence of intention to revoke, the will was entitled to probate as originally executed.

In 1843, the deceased, then passing by the name of Higgins, requested a friend to draw up her will, which he did, describing her as "C. Higgins," and the deceased duly executed that will, signing it "C. Higgins." In 1845, the deceased, who had in the mean time, but without any assigned reason, dropped the name of Higgins, and assumed that of Redding, requested the same person to alter her will for her, so far as regarded her name, and accordingly the name "Higgins" was turned into "Redding" in the body of the will and attestation clause, and the signature "C. Higgins" was erased with a knife. This was done in the presence of the deceased and subscribed witnesses; after which the deceased signed the will "C. Redding," but the witnesses, though present, did not sign the will.

Deane applied for probate of the will as originally executed. The facts stated in affidavit show that the deceased had no intention to revoke her will; and the nature of the act done to the will is immaterial, for to effect a revocation by burning, tearing, or otherwise destroying the will, the stat. 1, Vict. c. 26, s. 20, makes intention a necessary part. The second signing being inoperative for want of attestation, the executors now rely upon the original execution.

SIR H. JENNER FUST. The circumstances of this case are rather peculiar; but as it appears from the facts which have been stated, that the deceased had no intention of revoking her will, and her second signature has not been attested, probate must pass of the will as originally executed.

¹ 14 Jur. 1052.

In re Wingrove.

Prerogative Court.In the Goods of WINGROVE.¹

December 14, 1850.

Will — 1 Vict. c. 26, s. 21 — Practice.

Where the signature of the testator and the subscription of the witnesses are made in the margin of the will, near the alterations, the Court will decree probate of the will with the alterations, without requiring any affidavit as to the time when the alterations were made.

THE deceased left a will, dated the 2d September, 1840, duly executed, but there were several interlineations, against each of which, in the margin of the paper, were the names of the testator and the attesting witnesses. No memorandum, referring to such alterations, was written at the end or other part of the will.

Addams, in moving for probate of the will with the alterations, referred to the 21st section of 1 Vict. c. 26, providing that a will, with alterations as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin, or on some other part of the will opposite or near to such alterations.

SIR H. JENNER FUST. This will is on a printed form, but filled up in the testator's own handwriting; the alterations are also in his handwriting. The signature of the testator and the names of the attesting witnesses may have been written in the margin of the will after execution; but, however that may be, the terms of the act of Parliament have been complied with as to the alterations. Probate may, therefore, go out as the will now stands.

¹ 15 Jur. 91.

Note. — The question raised upon this motion was, in fact, whether any affidavit should be required from the subscribing witnesses in order to fix the time when alterations were made in the will, or other circumstances respecting those alterations, in cases where, in compliance with the terms of 1 Vict. c. 26, s. 21, the signature of the testator and the subscription of the witnesses were made in the margin; and Sir H. Jenner Fust held that no such affidavit was necessary. It may be doubted whether the same principle will apply to the cases in which merely the initials of the testator and witnesses are made in the margin; but it would seem that no affidavit ought to be required if the attestation clause contains a memorandum referring to the alterations, or a separate memorandum referring to the alterations be written on some part of the will, and the signature of the testator and subscribing witnesses be made at the foot, or end of, or opposite to, such memorandum, in accordance with the directions of the statute.

Yglesias v. Dyke.

Prerogative Court.

YGLESIAS v. F. H. DYKE, Esq.,¹ her Majesty's Procurator General.

November 26, 1850.

Capacity — Pleading.

An article, pleading a declaration of an attesting witness that the testatrix was insane in March, 1850, and had been so for years, the will being executed in May of the same year, was rejected as immaterial.

THE will in question in this case was drawn up from answers given to questions put to the deceased within twenty-four hours of her death. It was propounded on behalf of the executor, in an allegation pleading the *factum*, &c., in common form, and was opposed on the ground of incapacity, on behalf of the Crown, the deceased having died without relations. The responsive allegations consisted of twenty-four articles, and the 16th and 23d were, amongst others, objected to. They were as follows: Art. 16. "That in the month of March in the present year, 1850, the said deceased was taken very unwell, and was visited by W. S. G., surgeon; that the said W. S. G. met in consultation several times, at the said deceased's house, Dr. B., an attesting witness to the pretended will propounded in this case, who had been sent in to attend the said deceased by the said L. Y.; that the said Dr. B. and W. S. G. had many conversations about the state of the deceased's mind, and the said Dr. B. expressed his decided opinion, that the said deceased was insane, and had been so for years." Art. 23. "That on the said 6th day of May, in the course of a conversation respecting the capacity of the deceased to make a will, the said H. P. stated to the said Dr. B., that the said Mr. E. had refused to make a will for the said deceased, on account of the state of her mind; and the said R. W. P. also stated, that if any will was made for her, it would be contested on that account; whereupon the said Dr. B. replied, that he considered her fit to make a will, and that he had studied medical jurisprudence, and found that a person could legally make a will at a lucid interval.

Addams, (*Twiss* with him,) in objection to the 16th article. The general rule is, that whenever the credit of a witness is to be impeached by proof of any thing he has said, or declared, or done in relation to the cause, he is first to be asked, upon cross examination, whether he has said, or declared, or done that which is intended to be proved. This rule, and the reasons for it, are stated in 1 Stark. Ev. 183, 2d ed.; and therefore they ought, in this case, to have put the questions to the witness, and, if necessary, excepted to him after publication. But is there an exception to this rule in the case of an

Yglesias v. Dyke.

attesting witness like Dr. B.? To a certain extent there is. If the witness has made a declaration as to facts material to the issue, then, perhaps, you may be entitled to plead in contradiction before publication, but here the declaration is to a mere matter of opinion. This distinction is noticed in Rog. Eccl. Law, 376, commenting upon *Atkinson v. Atkinson*, 2 Add. 484. Upon the general principle, this article must be rejected. The 23d article cannot affect the credit of Dr. B., or the cause itself, and it would be a waste of expense to allow an article to remain, which, if every word were proved, must be useless at the hearing.

Sir J. Dodson, Q. A., (Jenner with him.) Whatever may be the opinion supported in Rog. Eccl. Law, Sir J. Nicholl, in *Atkinson v. Atkinson*, 2 Add. 487, says, "For instance, in the case of a subscribed witness to a will examined on a *condidit*, is the party opposing the will to wait till publication of the evidence has passed, and then to plead that the witness has said he never attested the will; or, as the case may be, in the shape of an exception to his testimony? I think that such declarations should have been pleaded before publication." This is a direct authority for the 16th article. [*Sir H. Jenner Fust.* — The deceased made her will in May, and this declaration is pleaded to have been made in March; how will that apply to the period when, by attesting the will, the witness vouches to the capacity of the testatrix?] The case set up is one of continued incapacity. In *Atkinson v. Atkinson*, Sir J. Nicholl does not directly take the distinction between a witness generally and a subscribed witness, but the words used by him show that such distinction was then present to his mind. The 23d article, taken in connection with the 16th, as to the conduct and declaration of Dr. B., may be very important; and, as it is admitted to be in form admissible, the Court will not reject it on a mere suggestion that it may be useless when evidence has been taken upon it.

SIR H. JENNER FUST. I do not think the circumstances of this case make it necessary for me to decide whether or not a subscribing witness can be contradicted by pleading before publication. I shall reject the 16th article, because the declaration there pleaded was made at an earlier period than the time of execution of the will. I shall also reject the 23d article; there is no substantive fact there pleaded, and I do not see how it can in any manner affect Dr. B.

Prerogative Court.In the Goods of CUTLER.¹

January 16, 1851.

Practice — Residuary Legatee — Grant of Administration.

ELIZABETH CUTLER, wife of J. Cutler, made her will under certain powers given her by the will of her father, and she therein gave and bequeathed the interest of the funds over which she had a power, to her husband for life. After his decease, she gave the principal sum in the following manner: 300*l.* to her brother, W. P.; 100*l.* to her niece, A. P.; 500*l.* to her sister, S. H.; 100*l.* to her brother, E. P.; and the residue of such principal sum to E. P. and W. H., upon trust to pay the interest thereof to C. F. for her life, and after the decease of C. F., as to 200*l.*, part of the principal of such last residue, to such person or persons, and in such manner and form, as the said C. F., notwithstanding her coverture, shall give and bequeath by her will; and in default of such gift, or as to so much and such part of the said sum of 200*l.* as may remain undisposed of, and also as to all the residue of the principal of such last-mentioned residue, she directed the trustees to pay and divide the same equally amongst the children of the said C. F.; and in case there should be none such, then to pay and divide the same equally amongst the brothers and sisters of the said C. F. living at her death, and the issue of such of them as may have died in her lifetime. The executors and trustees, E. P. and W. H., died without taking out administration with this will annexed, and the husband of the deceased is also since dead. C. F., now a widow, survived, and has consented that the administration should be granted to A. P. as a legatee. C. F. had three children, two of whom renounced, and consented to the grant being made to A. P. The third was in some part of America. The fund over which the deceased had the power consisted of the sum of 1315*l.* 16*s.* 9*d.*, and this sum had been lent by the trustees under her father's will to her husband on his four several bonds, the validity of which was disputed by his representatives, and the administration to Elizabeth Cutler was said to be necessary for the purposes of a suit in Chancery respecting these bonds.

Jenner moved for a grant of letters of administration, with the will, &c., to A. P., limited so far only as concerned the property over which she had, and had exercised, the power. The only objection to that grant was a doubt whether the child of C. F., who was in America, ought not to be first cited as a residuary legatee; but such child was not in the ordinary and technical sense of the word a residuary legatee, but a legatee who took a certain specified sum, a specific residue. That where a testator, disposing of a definite sum, as 1000*l.*, gave

Este v. Este.

700*l.* to A., and the residue of such sum to B., B. was not a residuary legatee. In *Repington v. Holland*, 2 Lee, 254, a residue was defined to be something uncertain, which shall happen to be left after the debts and legacies are paid; and the principle upon which the grant was made to a residuary legatee was said to be this, that he, having only what should be left after all charges paid, was bound, for his own sake, to be careful in collecting in and improving the estate — a principle which wholly failed in the present case.

SIR H. JENNER FUST. The decree may be dispensed with in the circumstances of this case, and the administration granted, with the limitation, in the manner prayed.

P r e r o g a t i v e C o u r t .

ESTE v. ESTE.¹

January 25, and February 11, 1851.

Practice — Pleading — Will made under a Power.

An allegation, propounding a will and codicil alleged to have been made by virtue of certain powers under a deed of settlement, did not plead the deed of settlement: —

Held, that the deed should be pleaded as an exhibit.

Barnes v. Vincent, 5 Moo. Pri. C. C. 201, considered.

L. C. ESTE, the deceased, a married woman, left a will and codicil, of which she named two executors, who propounded the same in an allegation in the common form, and merely reciting that she made the said will and codicil under and by virtue of certain powers and authorities vested in her by a certain deed of settlement, dated, &c., and made between her on the one part, and her husband on the other part. This deed was not pleaded or annexed to the allegation as an exhibit. The husband of the deceased opposed the will and codicil; and, on his behalf, —

Addams objected to the admission of the allegation, inasmuch as it did not plead the deed under which the will and codicil were made.

Sir J. Dodson, Q. A., and *Twiss*, in support of the allegation. [The argument went upon the case of *Barnes v. Vincent*, 5 Moo. P. C. C. 201, and is referred to in the judgment.]

SIR H. JENNER FUST. This case is described as a business of citing M. L. Este, the lawful husband of L. C. Este, to show cause why probate of her will should not be granted to the executors named

in the said will, under certain limitations : so the question arises with respect to the will of a married woman. The will purports to be made in pursuance of certain powers ; but what those powers were, their nature and extent, does not appear ; nor does the allegation give the Court any further information than can be derived from the will itself, for all that the allegation does is to describe the will as made and executed by virtue of certain powers. The admission of this allegation was opposed upon the ground that the powers which the deceased had, enabling her to make a will, notwithstanding her coverture, were not set forth in the allegation ; and it was argued that those powers ought to be set forth, that the husband might have the opportunity of really knowing the rights and the limitations under and subject to which his wife made the will propounded. On the other hand it was contended, and strongly contended, that this Court had no right to call for the production of the deeds giving the power, and that since the case of *Barnes v. Vincent*, in 1846, it was no longer to be the practice of this Court to call for the production of these instruments ; and that, according to the words of the noble and learned Lord (Lord Brougham) who delivered the judgment of their Lordships in that case, this Court had no right to look at the instruments in virtue of which it might happen that wills purported to have been executed. That argument was strongly pressed, and made to rest upon *Barnes v. Vincent*. With respect to that case, it may be observed, that both the power and the will there considered were previous to the year 1838, the will itself being made in 1836 ; and it is clear, when you come to look at the words of that judgment, that great part of the argument turned upon the anomalous state of the law with reference to the granting probate of wills of married women ; that the sentence granting probate would be inconclusive one way, whilst the sentence refusing probate would be conclusive the other way, since, if probate were refused, the Courts of Equity never would know of the will at all. And it was said that there was a considerable class of cases in which equity would relieve against a defective execution of a power — as in favor of a purchaser, or creditor, or child ; but if probate should have been refused by the Ecclesiastical Court, on the grounds of the execution being defective, no such relief ever could be extended in any case ; because the Court, which alone could relieve, never could know if the instrument existed, nor could see the defect in the execution ; and the Court of Probate was bound by the fact of defective execution, and could not remedy it. But the present Statute of Wills gets rid of the formalities which might be imposed upon the execution of wills by married women. The 8th, 9th, and 10th sections provide for and describe the manner and form of execution which will be necessary, in all cases, to give effect to the wills of married women executed since the statute came into operation. There are certainly some of the expressions in *Barnes v. Vincent*, which I have referred to, that would tend to show that this Court has no right to look at the power ; but I think those expressions must be taken with respect to the state of the law before the present statute, for no Court of Equity could now relieve against a

In re Beer.

defective execution, since the legislature has imposed certain forms which are absolutely necessary, and cannot be supplied, to give effect to the will; so that all argument derived from the power which the Courts of Equity had, before the statute, is now done away with. I am afraid the remedy suggested by the learned Lord, if this Court were, in all those cases where a power is alleged, to grant probate without calling for the power, would be very inadequate. But suppose the will to be contested on the ground of coercion, or undue influence, or incapacity, how is this Court to know who have a right to contest the will; in other words, who are interested in an intestacy, unless it has an opportunity of looking at the power? It is only by an inspection of the deed that this Court can ascertain the rights of the parties; and therefore, upon the general principle, I am of opinion that this settlement must be produced, and that the Court is entitled to look at the deed, that it may see who are the persons having a right to oppose probate, as interested in an intestacy, and to whom the property would go if the will were pronounced against.

Prerogative Court.

In the Goods of BEER.¹

February 11, 1851.

Practice — Executor of Executor — Chain of Representation under the Will of a married Woman.

REBECCA BEER, wife of W. Beer, by virtue of certain powers, made her will and two codicils, of which she appointed W. S. and S. S. executors; they proved the will. W. S. survived his co-executor, and died, leaving part of the goods of Rebecca Beer unadministered. His will was proved in the Prerogative Court by the executors therein named. Upon this state of facts,—

Addams moved the Court to decree letters of administration with the will and codicils annexed, of the goods of Rebecca Beer left unadministered, to be granted to one of the residuary legatees, named in the second codicil. [*Sir H. Jenner Fust.*—You do not contend that the chain of representation is broken?] No, sir.

SIR H. JENNER FUST. I cannot grant this motion; the executor of the executor represents the original testatrix, and the residuary legatee has no right to the grant.

¹ 15 Jur. 160.

In re Wells.

Prerogative Court.**In the Goods of WELLS.¹**

February 11, 1851.

Practice — Bona Notabilia — Trust Fund.

THE Rev. S. Wells, of his will, appointed his wife, E. Wells, sole executrix and residuary legatee. Mrs. Wells proved the will in the Prerogative Court, and administered the whole of the testator's beneficial estate. She died, leaving the whole of her estate within the archdeaconry of Totnes, having made her will, but appointed no executor, or residuary legatee, and letters of administration, with her will annexed, were granted by the Archdeaconry Court of Totnes, to her three sons, and only next of kin. The Rev. S. Wells was surviving trustee of a sum of 5869*l.* 19*s.* 1*d.* Consols; this sum was not transferred by his executrix, but remained in his name, and was the unadministered estate with which it was sought to deal. The three sons, as the duly constituted personal representatives of Mrs. Wells, now applied for letters of administration of the unadministered effects, with the will annexed, of the Rev. S. Wells, to be granted to them. The unadministered estate was sworn under 20*l.*, as a nominal value.²

Jenner, in support of the motion, submitted that the naked trust which passed to Mrs. Wells under her husband's will, did not constitute *bona notabilia*, and that her will was rightly proved at Totnes; so that her representatives were entitled to the grant prayed.

SIR H. JENNER FUST. The very foundation of your motion is, that property exceeding the amount necessary to constitute *bona notabilia*, is within the jurisdiction of this Court. How can I, then, consider that you represent the deceased through the Totnes grant? The proper course will be to decree the administration limited to the fund under the trust.

¹ 15 Jur. 160.

² To a certain extent the difficulty would have been obviated by swearing the unadministered estate under 5*l.*, since Mr. Wells, and Mrs. Wells as residuary legatee under his will, had no beneficial interest whatever in the fund, and the amount was merely nominal; and even had that course been taken, there would have been objections to a general grant.

Jermyn v. Hervey.

P r e r o g a t i v e C o u r t .

J E R M Y N v . H E R V E Y .¹

February 11, 1851.

1 Vict. c. 26, s. 9 — *Signature of Testator* — “*Foot or End.*”

THIS was a question arising out of the position of the signature to a codicil to the will of Lord William Hervey. On the 4th June, 1850, a motion for probate of this codicil, together with the will, to which it referred by date, but which had been revoked by the testator's marriage, subsequent to its date, was rejected, and the will and codicil were thereupon propounded by one of the executors named in the will. There were no executors named in the codicil. The allegation pleaded the factum of the will, which was dated February 17th, 1841, the revocation of such will by the testator's marriage, and his intention to revive it by the codicil, and which, in fact, he did by the execution of such codicil. This codicil was in the following words and form, commencing on the first page of a sheet of letter paper folded vertically :—

“ I, William Hervey, make and declare this to be a codicil to my last will, which will bears date the 17th day of February, 1841.

“ I give to my dear wife, Celicia, my house at Brighton, No. 16, Sussex-square, Kemp-town.

“ Witness.”²

And at the top of the second page were the words :—

“ Witness my hand, this eighth day of April, one thousand eight hundred and forty-five.

“ WILLIAM HERVEY.

“ Signed and declared in the presence of

“ C. K. SHERIDAN.

“ R. KERR.”

Curteis appeared in support of the codicil, contending that the word “witness,” which was written on the blank space left at the end of the dispositive part of the will, might be taken as the commencement of the testimonium clause, which was part of the will, and therefore the will was carried over to the next side of the paper; and the signature there following immediately after the testimonium clause, the will was thereby signed at the “foot or end,” as required by the act.

Addams, for the widow, raised no objection.

¹ 15 Jur. 184.

² These words extended nearly to the bottom of the first page. A blank space, however, more than sufficient for the signature, was left, but the word “witness” only appeared.

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SIR H. JENNER FUST. This question is of importance, as, if the codicil is not entitled to probate, the will, having been revoked by the deceased's marriage, is inoperative, and those benefited by it would be wholly unprovided for. I think the codicil is signed within the terms of the act of Parliament, and is entitled to probate. It revives the will; therefore let probate pass of the will and codicil.¹

Consistory Court.

In the Goods of ANDERSON.²

December 18, 1850.

1 *Vict. c. 26, s. 9* — *Will* — *Signature of Testator* — *Foot or End*.

THE will of this deceased was written on two sides of paper, the depositive part being carried over to the second side, and immediately following this, the usual words, "In witness whereof," &c. There was then a blank space of about ten lines, and the attestation clause, and the signatures of the deceased and the witnesses, followed in this form:—

"Signed by the said testator in our
presence, and in the presence of } Witnesses, GEORGE YATES,
each other. BENJAMIN HENDON.

"ALEXANDER ANDERSON."

Addams in support of the motion for probate of this paper.

DR. LUSHINGTON. There is nothing in the act to prohibit spaces being left; and although it may be doubtful whether the attestation clause is a part of the will, I think that, in cases of doubt, the Court should carry out the intention if possible. Let the probate pass.

¹ See note to next case.

² 15 Jur. 92.

Note.—Whether a will or other writing be "signed at the foot or end," or not, would, *a priori*, seem a very simple question; and yet the construction put upon these words has been apparently so different in different instances, that perhaps there is no class of cases upon which it has been more difficult to give a decisive opinion with satisfaction. It may, therefore, be worth while to examine shortly the principles upon which this point has been from time to time determined, and endeavor to ascertain if there is now any general and recognized governing principle as a guide for the future.

The learned Judge of the Prerogative Court was at first disposed to construe these words, "foot or end," with considerable liberality, and to act upon what was called the equity of the statute; however, a stricter construction was afterwards adopted; but the same learned person, still inclining to favor the manifest intention of the testators, thought himself at liberty to look at the contents of the will, and see whether

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the property was entirely disposed of, as by a bequest of the residue, for the purpose of ascertaining that the will was, in its dispositive character, a completed instrument. Upon this principle the case of *Ayers v. Ayres*, 11 Jur. 417, was determined. But *Willis v. Lowe*, 11 Jur. 807, in which case the will was complete in form as to its dispositive part, there being a residuary clause and the appointment of an executor, but the signature of the deceased was half way down the third side, though the will concluded about the middle of the second side, called for a more strict adherence to the letter of the statute. (See, for some observations on these two cases, 11 Jur. part 2, p. 422.) Soon after these cases came *Smee v. Bryer*, 12 Jur. 103; 13 Jur. 289, which was taken up to the Judicial Committee of the Privy Council; and although the opinion of their Lordships, as delivered by Lord Langdale, M. R., is often made an authority, it may fairly be doubted whether that case, except with reference to the words cited below, established any principle which can be made generally applicable. After *Smee v. Bryer* there were several decisions, many of which are reported in 1. Robertson; as, for example, *In the Goods of Howell*, 1 Robertson, 671; which seem to have turned on the greater or less space occurring between the conclusion of the will and the signature of the deceased; and at the beginning of last year, *In the Goods of Dawnay*, 14 Jur. 318, came before the Court, which may be taken to lay down, as the principle resulting from these cases, that the words "foot or end" may be satisfied by a common-sense construction being put upon them.

Unfortunately, this liberal and obvious construction has been very much weakened by a distinction taken between those cases in which the signature of the deceased is beneath and on the same side with the concluding words of the will, and where it is not on the same side, but is carried over — a distinction probably suggested by some words in *Smee v. Bryer*, 13 Jur. 289, where Lord Langdale, M. R., in describing the will in question, says, "No part of the will being immediately above it" — that is, above the signature. Still, if this rule, that some part of the will must be above the signature, or on the same side with the signature, were held to apply in all cases, there would be little reason why those who have to advise upon the point should complain of any difficulty in forming an opinion upon the cases which may be laid before them. But a further distinction is drawn, and it is said you must look to the manner in which a will so questioned concludes; for all wills have not the same form of conclusion. There is the dispositive part, which, of course, will be found in every will; but some wills have thereto added a testimonium clause, and some an attestation clause; others have neither of, and others again have both, these clauses. Then do these clauses, or either, form a part of the will, below which the testator may write his signature? Sometimes it would seem that such clauses are embodied with, and do form part of, the will, and sometimes they do not. *In the Goods of White*, 7 N. C. 543, the learned Judge of the Prerogative Court said, "In some cases the testimonium clause is the conclusion of the will; in other cases the attestation clause may conclude the will, though the signature of the testator ought to be at the end of the testimonium clause." And this is made more certain, since, *In the Goods of Batten*, 7 N. C. 289, the same learned judge expressed his opinion, that, "generally speaking, the signature should be placed at the close of the testimonium clause." So far, then, the testimonium clause may be considered a part of the will. Next as to the attestation clause. *In the Goods of Shadwell*, 7 N. C. 377, the dispositive part of the will ended near the bottom of the second page, space sufficient for the signature being left on that side, and on the top of the third side were the words, "Signed by me in the presence of the undersigned," and the signature followed. Probate was refused on motion. Why? Was it because these words, "Signed by me," &c., which are read as an attestation clause, did not follow immediately, and on the same side with the conclusion of the dispositive part of the will, but after a space ample enough for the signature was left on that side, and could not, therefore, be taken as a part of the will? If so, the attestation clause can then only be taken as part of the will where it is on the same side, or begins on the same side, and follows immediately, and without intervening space, the conclusion of the dispositive part, or the testimonium clause. And this view seems confirmed by the case of *Batten*, mentioned above, in which case the learned judge described the attestation clause as following the testimonium clause without a blank, and granted probate of the will; whilst *In the Goods of Pain*, 14 Jur. 1032, there was some little distance between the end of the will and the beginning of the attestation clause, and probate was refused. In the first of these cases the page ended with the words, "Signed in the presence of us, who, at the request and in the presence of the

In re Anderson.

said Amy Batten, testatrix, and"—the rest of the clause and the signature being on the next side. In the latter case the page ended with the words, "Signed, sealed, and delivered, by the above-named Mary Pain," the rest of the clause and the signature being on the next side.

The result, therefore, would appear to be, that where the testator has placed his name below the dispositive part of the will, and on the same side, the signature will, generally speaking, be well placed. The same rule will apply where he has signed below, and on the same side with the testimonium clause. And, lastly, that where the signature is below the attestation clause, but not on the same side with the conclusion of the dispositive part of the will or testimonium clause, the will is not duly signed, unless the attestation clause follow the conclusion of the dispositive part or testimonium clause immediately, and without leaving a space for the signature of the testator.

CASES
ARGUED AND DETERMINED
IN THE
HIGH COURT OF ADMIRALTY;
DURING THE YEARS 1850 AND 1851.

THE BENARES.¹

May 23, 1850.

Collision — Damage — Freight — 53 Geo. 3, c. 159.

The whole of the freight, without any deductions, due, or to grow due, for and during the voyage which may be in prosecution or contracted for at the time of the happening of loss or damage by collision, is liable to answer for or make good such loss or damage.

On her homeward voyage, the ship Benares came in collision with the Royal Archer. Several actions had been entered against the ship Benares and the freight, on behalf of different owners of the cargo, and for the crew of the Royal Archer, for their private effects, and bail had been given thereto to the amount of 8950*l.* The ship was appraised, by virtue of a commission, at 2765*l.* before the damage, and 2655*l.* after the damage. On the 20th March, 1850, and after bail had been given, an affidavit was brought in as to the amount of freight, setting forth that the gross freight on the homeward-bound voyage amounted to 2538*l.* 12*s.* 9*d.*, and claiming therefrom deductions for wages, &c., amounting to 630*l.* 4*s.* 6*d.*, thus constituting a net freight of 1908*l.* 8*s.* 3*d.* On the 25th April, 1850, the cause came on for hearing, when the Judge pronounced for the damage proceeded for, and condemned the owners of the Benares, and the bail given on their behalf, in the amount thereof, to the extent of the value of their vessel and the amount of freight. On the same day was brought in a further affidavit as to the amount of freight, not only on the homeward, but also on the outward voyage, viz., outward, 650*l.*; homeward, 2538*l.* 12*s.* 9*d.*; total, 3188*l.* 12*s.* 9*d.*; and claiming deductions therefrom for outfit of voyage, insurance on ship and freight, disbursements at Calcutta and St. Helena, wages of crew, disbursements at Liverpool, commission on collecting, freight, &c., and sundry other charges, amounting in the whole to 2466*l.* 10*s.* 5*d.*; thus leaving

¹ 14 Jur. 581.

The Benares.

a net amount of freight on the outward and homeward voyages of 742*l.* 2*s.* 4*d.* It was agreed that the opinion of the Court should be taken, in as summary a manner as possible, as to the right of the owners to any and which of these deductions, and for that purpose to move the Court to decree a monition against the bail to bring in 2538*l.* 12*s.* 9*d.*, as the total amount of freight earned by the Benares on her homeward voyage.

Addams (*Bayford* with him) applied to the Court to direct the owners of the Benares to bring into the registry the gross amount of freight earned on the homeward voyage.

Robinson (*Twiss* with him) submitted that the owners were entitled to the deductions. In *The Triune*, 3 Hagg. 114, the whole freight was directed to be brought in, but with a reservation that the deductions claimed for wages, shipping, and delivery expenses, should be referred to the registrar and merchants, and therefore admitting the legal right to the deductions. The sums charged were necessarily incurred in the earning of freight, and without their outlay no freight at all could have been earned. In *The Gazelle*, 2 W. Rob. 279; 7 Jur. 497, it was held, that, in fixing the amount of demurrage to be paid for the detention of a vessel during repairs incurred by a collision, a deduction must be made from the gross freight of so much as would, in ordinary cases, be disbursed on account of the ship's expenses in earning the freight. That principle would apply to and govern this case. They also cited *The Aline*, 1 W. Rob. 111; and *La Constancia*, 10 Jur. 845.

Addams. In salvage cases, the award is always made on the gross freight. It is true, that, in cases of bottomry, the Court looks to the net freight; but those cases are subject to very different considerations from the present; for, in cases of damage, the claim arises, not *ex contractu*, but *ex delicto*, and the measure of the indemnification is co-extensive with the amount of the damage, except so far as limited by stat. 53, Geo. 3, c. 159. *The Triune*, as far as the reported case goes, is no authority, for the very question of deductions was there reserved.

DR. LUSHINGTON. The question in the present case arises out of the following circumstances: An action for damage has been brought against a vessel called the Benares, and in that action the plaintiffs were successful. The ship and the freight are of course responsible for the amount of damage. It turns out that that is much larger than the value of the ship and freight; and the present question is, whether the whole of the freight ought to be brought into the registry, or whether any and what deductions ought to be allowed from it. I understand it is the wish of the parties that I should give my opinion on the question as it now stands, without any reference to the registrar and merchants. I think the parties are quite right in entertaining that opinion, because the reference would be perfectly useless, the

The Benares.

case depending on a question of law, and not on a question of fact. This is not an unimportant case: I cannot find that the question has ever been formally decided. It must be borne in mind in the consideration of this case, from beginning to end, that we are speaking of an action where the plaintiffs have been successful in a cause of damage. We must carefully distinguish it from a case of wages, or of bottomry, or any other case of a purely civil nature. It is very well known, that prior to the passing of the act of Parliament to limit the responsibility of the owners of a ship doing damage, they were liable to the whole extent of that damage, whatever it might be. No doubt that was a sound principle of law, because the owner was only made responsible for the negligence or wilfulness of his own servants; and *prima facie* there was no reason why that responsibility should be limited at all, inasmuch as the consequence of limiting it was, that a person having suffered injury, loss, and mischief from the improper act of the owner or his servants, was deprived of a part of the remedy, or, in other words, was left without the means of reimbursing himself for the loss so improperly incurred. However, the legislature deemed it wise, for reasons which it is not necessary for the Court to examine, to limit the responsibility; and we must recollect, in construing this act of Parliament, that it is prescribing a limitation, not merely upon the law as it stood before, but it is an intrenchment, so far as it goes, on the general principle of every man being entitled to recover the whole of his loss from the individual who inflicts it. The words of that act, 53 Geo. 3, c. 159, s. 1, are, "that no person or persons who is, are, or shall be, owner or owners, or part owner or owners, of any ship or vessel, shall be subject or liable to answer for or make good any loss or damage arising or taking place by reason of any act, neglect, matter, or thing done, omitted, or occasioned, without the fault or privity of such owner or owners, which may happen to any goods, wares, merchandise, or other things laden or put on board the same ship or vessel after the 1st day of September, 1813, or which, after the said 1st day of September, 1813, may happen to any other ship or vessel, or to any goods, wares, merchandise, or other things, being in or on board of any other ship or vessel, further than the value of his or their ship or vessel, and the freight due, or to grow due, for and during the voyage which may be in prosecution or contracted for at the time of the happening of such loss or damage." The question is, What is the meaning that ought to be attached to the word "freight" here? — whether it means the whole freight, whatever it might be, due in the course of the voyage, or whether any and what deductions are proper to be made out of it. It may be well to consider, first, whether this question has, in any degree, been decided on any former occasion, which would be a guide to me; but I confess, that, after having examined all the cases which were cited, it appears to me that the question is still left without any decision whatever. In *The Tribune*, 3 Hagg. 114, Sir J. Nicholl directed the whole of the freight to be brought in; and that is all that appears to have been done in that case, so far as it applies here. And *The Aline*, 1 W. Rob. 111, is an authority, so far as it goes, that, as against a mortgagee or bondholder

prior to the period when the damage is done, the successful suiter in a cause of damage has a preferable claim to be indemnified. It is to be remembered, that in all these cases we must bear in mind whether or not the owners of the ship which has done the damage are or are not solvent persons, because questions of exceedingly great difficulty might arise, which I do not anticipate, except by saying, that as questions of towage, wages, and salvage may all be mixed up in bankruptcy cases, I do not mean to bind myself by any observations I am going to make on any of those complicated questions. I do not see how the case of *La Constancia* applies to the present question. So far as appears to me, I am left, therefore, to decide this question upon principle and the construction of the statute, without being assisted by any case that I am aware of decided in this Court, and certainly not in the Courts of common law, because no such question could arise there. At common law there is no lien on the freight as there is here. If an action for seamen's wages is brought at common law, it is simply a question of contract, whether or not the service has been performed; and, therefore, the amount of freight, and the deductions from it, never could be the subject of consideration in that point of view at all; neither could this question be there considered in cases of damage. It is well known that a sailor has a treble remedy — against the owner, against the ship and freight, and against the master. I am not aware, therefore, that, where there is this treble benefit, it would be considered in another Court that there was any peculiar claim against the freight, though undoubtedly in this Court it has always been held that the mariner has a lien on the freight. This being so, let us consider a little what the words of the statute are, and I am afraid we shall get but little assistance from the words themselves: "The value of his or their ship and vessel, and the freight due, or to grow due, for and during the voyage." There is nothing said, on the present occasion, as to how they are to ascertain the value of the ship, or the amount of the freight, or whether any deductions will take place or not. I apprehend it is quite clear that no deduction can be made on account of bottomry, mortgage, pilotage, or towage, or any other demand of that nature. Then why should such a deduction take place on account of wages? Why should it be said, that in one case you are to take the gross freight, and in the other the net? Why the wages of the crew, anchorage, boat hire, pilotage, and towage should be more chargeable against the freight than against the ship, I confess I am at a loss to understand. It appears to me, if there were any doubt as to the solution of a question of this kind, that I should construe this act of Parliament with reference to the intention, if I can ascertain it, of the legislature — how far they would, in reality, damnify a person who had already suffered an unjust loss. The legislature have already limited his power to recover in words; but am I to go further, and limit, by my construction, that right, which he originally had as a matter of justice and equity, and according to the practice of all the Courts in this country? I am bound to construe this act of Parliament as leaving the ancient law, which unquestionably was founded upon principles

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of justice, as nearly as it was before, giving effect and force to the literal meaning of the terms used by the legislature itself. I cannot extract from these terms that there was any intention whatever to allow all the expenses which would be incurred during her voyage, on the part of the owners of the ship, to be deducted from the freight; certainly not from the ship, and I think not from the freight. Therefore I am of opinion that the whole of the homeward freight is liable to make good the damage which has been incurred on the present occasion.

THE BONAPARTE.¹

May 23, 1850.

Bottomry on Ship, Freight, and Cargo — Communication with Owners of Cargo — Master's Duty to tranship Cargo.

The master of a Swedish ship took up money on bottomry, in Sweden, on the ship, freight, and cargo. The owners of the cargo were British. The sum borrowed amounted to 390*l*. No appearance was given for the owners of the ship, which was sold under decree for a sum less than that due on the bond. No notice was given to the owners of the cargo, but the shipper was applied to, and refused to advance the money. The master made no attempt to tranship the cargo:—

Held, that the bond was good as against the cargo.

THIS case had been several times before the Court, and is reported 13 Jur. 1059, where the facts are stated. The arguments now offered in objection to the validity of the bond are all referred to in the judgment.

Jenner and Twiss, for the bondholder.

Addams and Robinson, for the owners of the cargo.

DR. LUSHINGTON. This was a proceeding against the ship, freight, and cargo, at the instance of Messrs. Wilson & Co., of Hull, as the legal holders of a bottomry bond; and bail was given on behalf of Messrs. Wilkinson, Whitaker, & Co., for the sum of 650*l*., the amount of the action, they being the owners of a part of the cargo, consisting of iron. Bail was also given for the freight due thereon. From the 25th April until the first June, the proceedings went on in *panam* against the ship and the remaining part of the cargo. On the 1st June, the proctor, on behalf of the bondholders, brought in his act on petition, and I apprehend the propriety of taking that step depended entirely upon the value of the ship and freight, as compared with the amount of the bottomry bond; for if the ship alone was sufficient to answer the bond, there could be no sufficient reason for proceeding against the cargo. I do not mean that it ought not to have been ar-

¹ 14 Jur. 605.

rested, but, having obtained bail, the suit against the cargo should have been suspended until the ship had been sold, unless it was manifest that the produce of the ship would have been insufficient to pay the bond. The reason of this is quite clear: the ship is the prior fund from which the bond should be paid; the cargo the secondary. The same principle would apply with equal strength to the freight, as decided by Lord Stowell in the case of *The Prince Regent*, not reported, but referred to in the judgment in *The Douthorpe*, 2 W. Rob. 84; 7 Jur. 609. On the 12th June, the answer to the act was brought in, and I think the proctor for the owners of the cargo, had he been aware of the state of circumstances, would have prayed the Court to stay proceedings against the cargo, until the ship had been sold and the deficiency ascertained. I think, therefore, that both parties did not see their way clearly, and consequently much time has been lost, unnecessary expense incurred, and the ship deteriorated. I must now look at the other proceedings, to ascertain whether the bond be or be not good as against the cargo. The original action stated that the ship belonged to Uddervalla, in Sweden; that she sailed from Gottenburg to Hull on the 13th November, laden with iron and deals; that, in consequence of disasters at sea, she was compelled, at the latter end of November, to take refuge in Romsso Bay; that on the 3d December she proceeded to Stromstad, where the cargo was unladen, and great repairs were found to be necessary. The master, as stated by the act, then went over to the owners, about sixty miles off, who were unable to furnish him with the necessary funds; but it turns out that he went from Romsso Bay, and the owners then desired him to borrow the money on bottomry. He applied to Mr. Toren, who advanced the sum of 392*l.* 15*s.* 11*d.* on a bottomry bond, dated the 26th March, 1849, and which purports to bind ship, freight, and cargo. The interest is to be at 15*l.* per cent. The ship reached Hull on the 7th April. The act further alleges, that the bond is valid by the law of Sweden, though the owners live in the country where the bond was granted.

The answer to the act is exceedingly brief. It denied that the bond was valid, according to the law of Sweden, as related to the cargo, and alleged that it was given for a former debt. On these pleadings the case came before me. The evidence on the part of the owners of the cargo did not support the defence, but affidavits were offered on matters not contained in the act. One of them stated, that the ship had never been repaired since she was built, and that appears to have been about twelve months ago; that her sails were of the same date, and her value was about 200*l.* In the act on petition it had been stated, and I am sorry to say erroneously, that she was of the burthen of fifty-two tons only, which led to a reasonable suspicion that the cargo might have been improperly sacrificed. The Court thought it right that further inquiry should take place, and surveys and appraisements were made. The vessel has been sold, pursuant to an order of the Court, and has fetched a sum considerably less than the bottomry bond; consequently, there is a deficiency, for which the cargo, if the bond be valid against it, is liable. Then how

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does the case stand with respect to the various grounds of opposition which have been raised? First, as to the averment that the bond was given for an old debt, there is no evidence to support that statement. Secondly, that the bond, as affecting the cargo, was invalid by the laws of Sweden. I do not think it necessary to pronounce any opinion upon this question of Swedish law, because I think that the validity of the bond must be determined by the general law maritime, and not by the municipal law of the country where it was granted, so far, at least, as any question arises upon the obligatory effect of the bond, upon persons not being Swedish subjects. Thirdly, with regard to the averments in the affidavits that the ship was a new one, and that no repairs had been done, and no new sails furnished, this charge is wholly disposed of by evidence—indeed, it is not supported at all. Fourthly, with respect to the value of the ship herself, she is of the burden of fifty-two Swedish lasts, or about 120 tons. Prior to the repairs, and after the damage, she was valued at Stromstad, at 416*l*., and after the repairs at 666*l*. I see no reason to believe that these documents are fraudulent, and I cannot, without external or internal evidence, assume them to be so. If this vessel was of the value herein stated, or nearly so, at the time the bottomry bond was taken, there is an end to all suspicion that it was granted merely to make the cargo bear the expenses of the ship. Had the ship been sold here, without incurring any expense, as soon as the proceedings would have allowed, I think the deficit, if any, would have been very small. There being no fraud, is the bond invalid by the general maritime law, as relates to the cargo, by reason of such bond being granted in the country of the owner of the ship, and no notice being given to the owner of the cargo? I am of opinion that the principle, so far as it extends, that a bond shall not be granted in the country of the owner of the ship, was chiefly directed to the protection of the owners of the ship, and not of the cargo. The last objection is, that the cargo ought to have been transhipped, or some communication made to the owners of the cargo. It is quite clear that there is no general obligation on a master to tranship, and it appears that information was given to the shipper of the cargo, and that he refused to advance any money at all. I know of no authority which rendered it necessary that the master should communicate with the owners resident in England. I must pronounce for the validity of this bond, for the objections of fact, are not proved, and the objection of law is not maintainable; and I must give the bond-holders their costs.

The Active.

THE ACTIVE.¹

May 30, 1850.

Meritorious Salvage — Apportionment.

THIS was a suit instituted by the master, second mate, and one seaman, belonging to the American bark *Tartar*, for salvage. The services were rendered in peculiar circumstances. The *Tartar*, whilst on her voyage from Calcutta to Boston, in the United States, in latitude 13° north, and longitude 46° west, fell in with a brig with a signal of distress, which proved to be the *Active*, of the burthen of 170 tons, laden with sugar, from Pernambuco to Hamburg. The master of the *Tartar*, on boarding the brig, found that shortly after she had left Pernambuco the yellow fever had broken out on board, and had already destroyed seven hands of a crew consisting originally of eleven, including the master; that the master was then actually dying; that of the three remaining one had lost the use of his right arm, and that none of them were acquainted with navigation. In these circumstances the master of the *Tartar* expressed his wish and readiness to render them any assistance, stating, at the same time, that he could not compel any of his crew to come on board a ship situated as the *Active* was. On his return to the *Tartar*, the second mate and one seaman immediately volunteered, and having been put on board, they succeeded in bringing the ship and cargo safely to Falmouth. The master died soon after they came on board. The value of the ship, freight, and cargo was agreed at 4300*l*.

R. Phillimore and *Deane*, for the salvors.

Addams and *Twiss*, for the owners, offered no opposition, admitting the merits of the salvors.

DR. LUSHINGTON, after stating the circumstances, and commenting shortly on the high nature of the services, gave the sum of 1500*l*, and apportioned 500*l*. to the mate, 400*l*. to the seaman, and 600*l*. to the master of the *Tartar*, to meet any claims of the owners, for whom no appearance had been given.

¹ 14 Jur. 606.

The Lochlibo.

THE LOCHLIBO.¹

June 19, 1850.

Witness — Impeachment — Practice.

Where a witness proves facts in a cause which make against the party who produces him, and an account of the transaction which he had given the proctor before his production is entirely different from that sworn to by him on his examination, the party producing him may produce fresh witnesses to prove the original facts, but cannot plead in exception to his own witness, nor plead the account he had given of the transaction.

ON publication, in a cause of damage, by plea and proof, it appeared that a principal witness for the defence had proved facts which made against the defendant, and that the account of the transaction which he had given the proctor, before his production, was entirely different from that sworn to by him on his examination. In order to discredit this witness, an exceptive allegation, the contents of which are sufficiently referred to in the judgment, with an exhibit annexed, containing his statement, taken down by the proctor, was brought in. The admission of this allegation was opposed.

Addams, (Twiss with him,) against the admission of the allegation. This is an experiment of a novel kind in these courts, and in support of which no analogous case at common law can be produced. The principle which must govern in such cases as the present, is stated in Ph. Ev. 902, that you may not discredit your own witness by general evidence, but may prove your facts otherwise; and so in B. N. P. 297; *Reg. v. Ball*, 8 Car. & P. 745; *Wright v. Beckett*, 1 Moo. & R. 414; and *Holdsworth v. The Mayor of Dartmouth*, 2 Moo. & R. 153. These cases also make against the attempt to discredit the witness by bringing in the statement he made to the proctor. The proctor acted very properly in getting that statement from the witness, but he cannot discredit the witness by showing he has given a different account. In this case, eight other witnesses have deposed to the facts, and it must be assumed that they have given a contrary account of those facts from this witness, for they are not excepted to; therefore they contradict him; and that is sufficient to discredit him, though indirectly. If an exceptive allegation of this kind can be admitted, it must be in a case where the witness is a single witness to an important and material fact.

Harding, (Bayford with him.) The allegation may be a novel experiment in the Court of Admiralty, but the principle upon which it is offered has the sanction of the Ecclesiastical Courts; and the reasons why such an allegation is admissible are stated at length in a note to *Mynn v. Robinson*, 2 Hagg. 175; therefore the first objection, that the proceeding is unprecedented, is disposed of. The second objection is taken upon general principles, but it happens, unfor-

¹ 14 Jur. 792.

tunately, that in the chief case relied upon in support of objection, *Wright v. Beckett*, the two judges, Lord Denman, C. J., and Bolland, B., whose opinions are reported, differed; so that it would seem, independently of what is said in Phillips on Evidence and Starkie on Evidence, that no generally recognized principle on the subject does in reality exist, each case depending upon circumstances, and upon the practice of the Court before which the suit may happen to be.

DR. LUSHINGTON. Whatever may be my ultimate opinion as to the admissibility of the allegation which is now offered to the consideration of the Court, of this I am quite certain, that it was the duty of the counsel who signed that allegation to submit it to the judgment of the Court itself, because, no doubt, the circumstances of this case are exceedingly peculiar, and no doubt that the principles of law applicable to its decision are involved in a considerable degree of difficulty. I should not have hesitated to have taken further time before I pronounced my judgment, if I had not already had an opportunity of considering the case, and thought any good would arise from postponing my decision, and that there might not be some evil from delay. With regard to the rules which are to govern the admissibility of this allegation, it is well known that all the rules of evidence, which now constitute a great code at common law, have from time to time been established as best fitted for the general discovery of truth in the great majority of cases. It never has been pretended, and as long as limitations exist on human wisdom, it never will be contended, that any rule can be laid down, with regard to the admissibility of evidence, which will clearly suit and fit the justice of each particular case. There must now and then arise cases of exception, when other rules might be more beneficial for the attainment of the great end of all evidence, namely, the discovery of the truth itself. And with regard to the Court of Admiralty, I believe that this is the first instance, so far as my experience goes,—so far as my recollection of what I have heard in former times enables me to pronounce with any confidence,—this is the very first time in which an attempt has been made to introduce an allegation of this peculiar character. But I am not inclined to consider that the absence of the occurrence of any necessity for introducing such a plea ought to operate as a bar against the Court admitting the plea, if upon the whole I should consider that the interests of justice required it, and the rules of law permitted it. With regard to other Courts proceeding somewhat upon the same principle,—I mean the Ecclesiastical Courts of this country,—no doubt cases have arisen in which allegations exceptive to the testimony of witnesses produced by the party, where the allegation has been offered by the same party, have been admitted; and it was so in *Mynn v. Robinson*, 2 Hagg. 169, the case cited by the learned counsel who argued first on behalf of the owners of the Lochlibo in this case. I cannot say that I altogether concur in the note which is appended to that case; I cannot say I do. It may be the case, but I do not find that any exceptive allegation of this description has been admitted by the Ecclesiastical

Courts, save in the peculiar case of what are called "subscribing witnesses;" and I must entertain the opinion, that, in the case of subscribing witnesses, there exists a very substantive distinction in our proceedings. I apprehend it is absolutely necessary to produce, if you can, all the subscribing witnesses—that you must either produce them, or account for their absence; or you may take another alternative—you may entirely distrust the credit of a subscribing witness, and you may offer him for examination on interrogatories, declining to examine him yourself; but produce him you must, or give a satisfactory account why it is not in your power to produce such subscribing witness. Now, in the Courts of common law, unquestionably a different rule prevails, even under the Statute of Frauds. It is well known, that under the Statute of Frauds a will might be proved at common law by the evidence of a single witness. Of course, there might arise prejudice from the non-production of other witnesses, but so it was. Now, in the note to *Mynn v. Robinson*, 2 Hagg. 175, it is said, after having stated the general rule of common law, "But in the Ecclesiastical Courts, where the depositions are never seen till all the witnesses have been examined, it is necessary that parties, though they may not, before publication, attack the general character of their own witness, should be permitted, after publication, directly to except to his credit." I am not prepared to say that is a proposition which has been laid down, maintained, or ever admitted in these Courts; "because, as no plea unless exceptive, and no evidence, unless on such a plea, can be given at this stage of the cause, parties would otherwise be precluded from contradicting their own witness falsely deposing to the occurrence of matters which might go to the foundation of the whole case, and yet to which it could not have been foreseen that he would speak." Now this reason is not altogether satisfactory to my mind, because I apprehend that the real truth comes to this, that whatever a witness may have said upon a plea, and fairly within the margin of that plea, though in opposition to it, if it should be discovered, after publication in the cause, that the witness has so unexpectedly negatived the plea, it would be competent to the Court, instead of admitting an exceptive allegation, to rescind the conclusion of the cause, and examine other witnesses, which would be not excepting to witnesses already examined, but contradicting the facts to which they have deposed. So I think also, suppose a witness examined in the cause accidentally may have deposed to matter which may be considered in one light extraneous to the plea, or in answer to an interrogatory, the contents of which the parties who produced the witness could by no possibility tell, if any answer came entirely unexpectedly, it would be consistent with the demands of justice, and within the power of the Court, to allow an allegation to be given, not in exception to the witness, but in contradiction to the facts which have so unexpectedly come up. That I apprehend to be the true question. "The variation, however, between the practice of the common law Courts and of the Ecclesiastical Courts, arises only from the different manner in which the evidence is taken, and the different opportunities thereby

afforded to a party of obviating the effect of his own witness unexpectedly deposing against him, and is a variation in form rather than in substance." I think it is a variation in substance as well as in form. "At common law, the primary purpose of the examination of other witnesses is to support the party's original case; the accidental consequence, to discredit the first witness." That is perfectly true. "On the other hand, in the Spiritual Courts, the primary purpose of an exceptive allegation is to destroy the credit of the witness; the accidental consequence, to support the original case." Now I think that appears to be attributing to these Courts a line of conduct in direct opposition to that pursued in common law, namely, it commences by distrusting the credit of the witnesses, instead of giving the parties that which they are justly entitled to—an opportunity of contradicting the facts which unexpectedly come out from their own witness on an allegation, or in answer to an interrogatory administered to him by the adviser in the cause.

Now it has been said, and very truly said, by Dr. Bayford, that it is my duty—I believe it is, and I am sure it is my most earnest desire, so far as I can, consistently with precedent that might bind and fetter me—to assimilate the reception of evidence here to the reception of evidence at common law, and admit all those principles into action here in the despatch of the business before me; and if I understand the rule which has been adopted in Courts of common law—I mean generally—I will come to the case of difficulty presently—the rule adopted in Courts of common law is universally true and correct—a rule respecting which there is no doubt, and respecting which there is no difficulty—it is, that if your witness, upon being examined in chief, or cross examined, even in that case, does depose utterly contrary to what might reasonably be expected of him, you shall be at liberty on the trial to adduce other witnesses, for the purpose of proving the facts which you originally intended to prove, and consequently, of necessity, by such evidence, negating that which the witness had so said. Now that I apprehend to be the principle beyond all dispute—beyond all doubt. It is precisely the course followed in the great case of *Lowe v. Jolliffe*, 1 W. Bl. 365, where the three attesting witnesses, called to show that the testator duly executed his will, proved it, yet one and all swore that he was of unsound mind, and incompetent to do the act; but by the evidence of the most respectable persons in the country—physicians and other persons—their evidence to that effect was entirely overthrown, and a verdict was given for the will. That is a principle to which I accede altogether, and by which, to the utmost of my power, I will act in this and other cases. But there is another question—another point of infinitely greater difficulty, and upon which I am very reluctant to pronounce any very decided opinion—and that is, not whether you may not produce witnesses who shall prove facts entirely to discredit the evidence of your own witnesses, but whether you shall produce evidence tending to the discredit of that witness himself. Now that is the point with me, and that does not fall within the principle to which I have already addressed my attention; it does not at all

necessarily fall within that position, that you may produce witnesses to establish facts which your own witness has improperly negatived. It does not follow that you shall be at liberty to discredit your own witness, by proving either misconduct in any way on his part, or proving that at another and a different time he has made another and a different statement; and here is the great difficulty in this case, supposing there should be — which perhaps there may not be — any necessity to press it to its ultimate decision on the present occasion. Now I will take the case which was referred to by counsel. I will take the case of *Wright v. Beckett*; and in the case of *Wright v. Beckett*, one of the witnesses had entirely broken down — this is in a civil case — and it was attempted to show that he had given another and a different statement to the attorney of the party, plaintiff in the cause, at an antecedent period; and upon the admissibility of such evidence the Court was equally divided, the Court happening to be the Common Pleas of Lancaster, and consisting of Lord Denman, C. J., and Bolland, B. See what this case was. This was, in substance and effect, not merely to contradict the statement of your own witness — which might have arisen from a want of memory, which might have arisen from error, which might have arisen from a variety of causes independently of corrupt swearing — not merely to do that, but absolutely to discredit him, and to show that he was unworthy of belief. That is to do in another mode that which you are prevented doing in a straightforward way, namely, to discredit the witness by general evidence. Now I am bound to say, if I were compelled to choose between authorities, great as is that of Lord Denman, I must give my opinion in support of the determination of Bolland, B.; and I think so for another reason, because all the authorities, with the exception of two, are entirely in favor of the view which Bolland, B., took; and those two cases, which I do not think fall rightly within the subject we are now discussing, were cases of criminal trials, and they touch upon the question of looking at the depositions given before magistrates, and allowing them to produce an effect on the mind of the jury. Whether that was right or wrong, in these individual cases, of course it is not for me to pronounce an opinion; but upon the general rule of law, as laid down by Bolland, B., I must say, supported as it is by Parke, B., I should agree in judgment with him if I were under the necessity of deciding the case upon it, but I do not think I am.

Now I come to the consideration of the case itself. There was originally sent to me nothing but the exceptive plea in this case, and upon an exceptive plea, in a case like this, I should just as well have been able to form a correct opinion upon it, as the gentleman was of a house, from a brick which a philosopher presented as a specimen. It is just as impossible that any man could form a judgment as to the admissibility of an allegation of this kind, unless he made himself master of the pleadings, and of the evidence of the witnesses in this case — not only of this witness, but the evidence of many other witnesses in the case. The case stands thus — it is a proceeding on behalf of the *Aberfoyle*, a vessel lying at anchor, against the

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Lochlibo, for running into her; and the great defence on the part of Lochlibo—I do not mean to say the exclusive defence, but the chief defence—is, that she had a licensed pilot on board, and did every thing that the licensed pilot directed to be done. Now let us see how the case stands. This is the ninth article of the allegation upon which Wilson, the party now excepted to, has been examined: “That the said John Barber Thornton is a duly licensed Cinque Port pilot, and immediately on his coming on board the said ship, the Lochlibo, the said William Boyd, the master, gave up to him the entire control and direction of the said ship; and the said pilot thereupon assumed the charge of the said ship, and alone gave all orders and directions for the navigation thereof; and all such his orders and directions were exactly and implicitly obeyed, and no person whatever in any manner interfered with such the orders and directions of the said pilot, nor in any manner whatever, save as in obedience to his orders, either navigated or attempted to navigate the said ship; and that whatever was done on board the said ship by her master or crew, in reference to the navigation thereof, was so done solely by the orders, and in obedience to and in direct conformity with the orders, of the said John Barber Thornton, acting as the pilot of the said ship.” I do think it would have been utterly impossible, if the occurrence of the present circumstances had been foreseen, that any thing could more directly and explicitly plead and contain the intention of the parties, of throwing the blame—if blame there was—on the pilot himself. Now then, what has been done? Wilson has been examined on this and on interrogatories, and Wilson has contradicted the plea. I need not go through the particulars of his evidence; but the substance of his evidence is—it is the real point on which the parties on the other side would rely—he has said that the master directed the helm of the vessel to be starboarded before the pilot, and it was in consequence of the confusion between starboard and larboard, and the interference of the master, that the collision occurred. In other words, he has expressly negatived the ninth article, by his testimony here and on the interrogatory, and there has nothing come out in his evidence, either in chief or on interrogatory, that does not necessarily come out on the ninth article. If that be so, what is the remedy for the Court to give to the party? What is the proper course to be pursued? Why, if any witnesses have not been examined to prove the facts which Wilson has been called to establish, to give the party the benefit of examining those witnesses. That course I am ready to take. But what would be the consequence of admitting the allegation? It would be to admit what is neither more nor less than an actual replender of the allegation previously given in in the cause. And if there be a rule more established than another in these Courts with which I should be most reluctant to interfere, it is, not to allow, after publication, a replender of what was pleaded before. The course I shall follow is this: I will allow the parties to examine any other witnesses they think fit, in order to establish this article of the allegation, from whom they may expect to find evidence in support of this

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article, and of course in contradiction to the testimony of Wilson, the first mate.

But I must add one other word. I should be most reluctant myself, unless the rule of law positively compelled and coerced me, at any time to admit the statement of a witness, made to a solicitor or proctor antecedent to the examination of a witness, and signed by him, for the purpose of contradicting that witness. It is, of course, the duty both of a proctor and of a solicitor, before they bring forward a witness for examination, and produce him in the cause, to ascertain, as directly as they can, the testimony that witness is likely to give; but I have yet to learn that a witness is to be tied and pinned down by his signature before. I think it is for the interests of justice, and the only way to get at the truth, that a witness should go before the examiner to give his evidence not tied down or coerced by any statement previously made to any solicitor or proctor in the cause. I think, moreover, it would be a very dangerous mode of proceeding to oppose a statement loosely taken, not on oath, to evidence given on oath; and it would be very difficult to convince my mind, except in some glaring cases, that a witness deposed falsely, because it happened that his statement was not compatible with the sworn evidence in the cause. I must decline admitting the allegation, but I will give that opportunity to the parties which I have now offered. It appears to me it is all they can ask for, if the allegation was admitted with the exception of the article and exhibit which plead the account given by the witness to the proctor, and which I would not admit. If the object is to get rid of the witness, by proving an opposite state of facts, that opportunity they will have. If their object be to discredit him by the statement made to the proctor, that is an object I cannot further.

THE LOCHLIBO.¹

July 25, 1850.

Collision — Pilot — Interference of Master and Crew.

A ship under sail, and in charge of a licensed pilot, in running through the Downs on a dark night, came into collision with a ship at anchor:—

Held, first, that where a pilot is taken on board, it is his duty, and not that of the master, to determine where, and whether or not, the ship shall be brought up.

Secondly, interference, as distinguished from suggestion, is the doing that which the pilot alone ought to have done.

Thirdly, a hail from any of the crew on the look-out to alter the helm, if such advice be adopted by the pilot as a proper measure in his own judgment, will exonerate the owners; otherwise if the advice be adopted by the pilot unthinkingly, and on the mere report of the look-out.

¹ 14 Jur. 1074.

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THIS was a cause of collision promoted by the owners of the Aberfoyle against the Lochlibo. The points upon which the case is intended to be reported are referred to in the judgment. The Court was assisted by Trinity Masters.

DR. LUSHINGTON. I think it expedient to state to you what I apprehend to be the principle of law, as applying to the facts which are admitted in the case—the facts admitted being, that the Aberfoyle was at anchor, and the Lochlibo was in sail. As the Lochlibo ran into a vessel which was incapable of helping herself, it is her duty to prove, in order to exonerate herself from the blame, that the collision arose from circumstances which it was utterly out of her power to prevent, or that it was the fault of the pilot on board, or that it arose from the default of those on board the Aberfoyle. It may be desirable that I should state to you how I apprehend the law stands with regard to the default of the pilot. The statute is in these words: “That no owner or master of any ship or vessel shall be answerable for any loss or damage which shall happen to any person or persons whomsoever, from, or by reason or means of, any neglect, default, incompetency, or incapacity of any licensed pilot acting in the charge of any such ship or vessel, under or in pursuance of any of the provisions of this act.” Therefore it is necessary for the owners of the Lochlibo to show, that if any blame does attach to that vessel, it arose upon some neglect, default, incompetency, or incapacity of the licensed pilot, and not from any default whatsoever of the master and crew; for it is settled law, I apprehend, that if a collision arises from a default made partly by the pilot and partly by the master or crew, then in that case the owners are not exonerated from the damage under the statute. Now, of necessity, the burthen of proof must fall upon those who have to defend themselves under these circumstances. *Prima facie*, as was properly and wisely admitted by the counsel, the Lochlibo is to blame, for having run down a vessel at anchor; but she may, by credible evidence, establish a defence so as to relieve herself from all responsibility. It was argued that the master was responsible, the vessel having proceeded on her voyage after the pilot was taken on board, for not having either taken in sail, or for not having brought up, as it was contended she ought to have done. The first question I will put in these words—whether the Lochlibo ought to have run through the Downs on such a night as is here described, at that season of the year. That will be a question exclusively for you to determine, because it is one upon which I do not pretend to form an opinion. You alone can be aware of the propriety of running through the Downs, and the chance and hazard of encountering other vessels lying at anchor there. Of course, if there was any probability of danger to other vessels, then the vessel ought not to have proceeded through the Downs. Then you will have to consider further, if it was a proper measure to proceed through the Downs, whether she took all the necessary precautions as to sails and as to lights. You will also have to consider whether she did or did not go too much to the south, too near the South Sand Head Light,

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and so lead to mischievous consequences. I put these points to you — they are purely nautical — because I am desirous of having your opinion upon them, and because it is very possible the case may travel farther than the present Court; and all the parties have a right to have your opinion, though I will tell you my opinion, not as to the nautical points, but as to the responsibility that will attach to the vessel. Now it was contended, that if any of these measures were wrong, the master must participate in the blame; he ought not to have allowed the vessel to sail, and he ought to have interfered on that and other occasions. In order to establish that position, the case of *The Girolamo*, 3 Hagg. 169, was referred to. This case was decided by my predecessor, Sir John Nicholl, and was said to be a case in point. It is necessary that I should state what that case was, and how far I cannot altogether accede to the position there laid down. That was the case of a vessel proceeding down the River Thames; a fog came on, and she ran into a vessel in the neighborhood of Woolwich. It was a case that went into a great deal of argument on a point foreign to the present question, whether the Pilot Act did or did not apply to the vessel of a foreign owner. It was ultimately decided on that point, which is not unimportant. Sir John Nicholl says, "Did the accident arise from the neglect, default, incompetency, or incapacity of the pilot, or was the master in *pari delicto*? It occurred from the vessel going on in the fog, not from any act of bad steerage, want of knowledge of shoals, or any incapacity as pilot, but from proceeding at all. It seems to be nearly admitted, that, if the vessel had set off in the fog, blame would have been imputable to the master; if so, was he not blamable in going on in the fog? Had he not a right to resume his authority? Did he not owe it to his owners, and to other persons whose property might be damaged by a collision, to insist on bringing the vessel up? If he was in as much haste to get out of port as the pilot was to finish his job, are they not both in *pari delicto*? Was not the master in duty bound at least to remonstrate with the pilot, and to represent the danger of proceeding? Yet, he says in his affidavit, he did not in the least interfere. In this aspect, the case is, as far as I am aware, new, and one of too much difficulty to arrive at any hasty decision upon, unless there be no other points upon which the case may be disposed of." So that, in fact, the question was discussed by Sir J. Nicholl, and I think it is probable that the leaning and bearing of his mind was, that the master would be responsible, for not having interfered under the circumstances; but it is not a case decided on those grounds, nor is it a direct authority to us. I am bound to tell you what is my own opinion. I am bound to tell you, looking at this case, whatever might be the decision in the one already referred to, I am of opinion, that where a pilot is taken on board at Dungeness for the purpose of navigating a vessel to Margate or Gravesend, or wherever it may be within his pilot grounds, it does appear to me that all the responsibility attaches on the pilot under all the circumstances; it is no part of the duty of the master to interfere, or determine whether the vessel ought to be brought up at the North Foreland, or in the Downs, or in Mar-

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gate Roads; but that is clearly a part of the vocation of the pilot, and I cannot consider that in this case the master was to blame. Even suppose you should consider the pilot was to blame for not having brought up the vessel, it appears to me it would be a most dangerous doctrine, considering the duty imposed upon pilots, and the local knowledge they are supposed to possess, if I was to sanction the interference of the master, in any way, in the performance of a duty, which duty they ought to be competent to discharge, and with respect to which the master, in the majority of cases, must be a very inferior judge to the pilot. Of course I do not mean to go the extraordinary length of saying, that, if it was quite manifest that the pilot was utterly incapable, it would not be the duty of the master to interfere for the preservation of life and the property under his care; for I will ever hold the doctrine that it would be his duty in the extreme case. But, in relation to the circumstances of this case, I am satisfied it was entirely within the province of the pilot to determine what was to be done with the vessel at the time he took charge of her, and the master is not culpable for not having interfered and prevented him doing what he did. The next part of the case relates to what took place immediately before the collision, when the Lochlibo was near other vessels; and the pilot of the Lochlibo does this — he says, as soon as he heard the vessel reported, he ordered the helm to be put hard a-port. “The helm had not been put hard a-port three minutes, before the look-out forward, but which of them I do not know, reported, ‘A vessel on the starboard bow,’” (now, gentlemen, the master corroborates him to the extent of saying it was on the starboard bow; but the boatswain declares positively it was right ahead, and repeats it on interrogatory,) “and immediately added, ‘Hard a-starboard the helm, or you will be over him.’ I instantly ordered the helm hard a-starboard.”

Now, gentlemen, the first question which we have to consider is, was that a right measure, or was it not; and if it was a wrong measure, who is to blame for it? Now it will be for you to determine whether it was a right or wrong measure — the helm of the vessel, the Lochlibo, had been hard a-port, and when she had just passed the first vessel, unknown, but some twenty or thirty yards off, and when a vessel was reported right ahead, or only a little on the starboard bow, which is the utmost the evidence goes to, and when she had answered her port helm three or four points, and was swinging with the tide — whether you consider it was consistent with good seamanship to order the helm to be put to starboard — which of course must take some time before it could produce any effect, and, according to the witnesses, they say the whole effect was to neutralize the sails. This is a very important point. I confess I am bound to express my opinion, and I am convinced it was a measure totally wrong; and in all probability this collision would never have taken place if that measure had not been pursued. But it will not do to rest here. *Prima facie*, the direction of the helm rests entirely with the pilot; he is the person to give all orders for alteration of the helm, and if his orders are wrong, he alone is responsible, and the owners of the Lochlibo are exempted.

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But it is a very nice question to determine whether or not this was exclusively the act of the pilot, or whether some of the blame, if blame there be, is not to be shared with the master or some of the crew. Before we proceed to consider minutely the question of which way the helm was put, you must take that which is of necessity a preliminary inquiry, which is, whether there was a good look-out kept. You have in the evidence, that the whole crew were on the deck of this vessel, that two persons were placed one on each bow, and that the boatswain was between the knight-heads and the bowsprit. Now, certainly, it is a great calamity, that in a case of this description we should be without the evidence of either of the persons who are alone admitted to have been appointed to the look-out; that is a great misfortune; it places the Court, and you, gentlemen, in a state of no small degree of difficulty. I cannot think that a satisfactory account has been given for the absence of these two individuals, because it is quite evident, that after this collision had taken place in the Downs, and there was a valuable cargo, to the extent of many thousands, lost, the owners of the *Lochlibo* must have anticipated some proceedings against her, and have anticipated that the look-out was one of the most important parts in the case; and the two witnesses, wherever they are, would be witnesses of great importance. If I had distinct evidence that these persons had suddenly gone away, and they could not recover them, the case would stand differently; but I do not think this a neglect of which the Court has reason to complain, as a deficiency in enabling it to ascertain the nature of the case. We come back to the starboarding of the helm. With regard to this, the pilot says, "The look-out forward, but I do not know which of them, reported, 'A vessel on the starboard bow,' and immediately added, 'Hard a-starboard the helm, or you will be over him.' I immediately ordered the helm hard a-starboard." Now, really, I am obliged to say this: if the boatswain had erroneously imagined that to be the proper measure, and hailed the pilot to adopt that measure, and the pilot unthinkingly adopted the advice of the boatswain, I must say I cannot exonerate the boatswain, because he was on the look-out. If, on the other hand, it was, in the judgment of the pilot, a proper measure to pursue, though an error, the whole blame would fall on the pilot; and that is a question of no small difficulty on the present occasion. But I do not think that is the whole of this case. We have the evidence of Cole. I agree with the argument for the owners of the *Lochlibo*, that this person was competent to give evidence of what he did. He has sworn distinctly that no order was given but that to starboard, and that was immediately obeyed; and that is a testimony to which we must give its due weight, considered with the testimony of other witnesses. But here, again, I have to regret that the other man with him has not been produced, because this is the gist of the case, whether there was any vacillation, and that vacillation prevented a decisive course being taken, and consequently brought about the damage that occurred. We must see how the evidence lies on this point, and whether Wilson, who has given his testimony, is a credible witness upon the whole. He says, "Shortly before the

collision, some one forward, I think the boatswain, but I cannot be certain it was his voice, reported a ship right ahead, but I did not see her then, nor until after the collision in question, when she seemed to me to be a bark in ballast, standing high out of the water, and painted yellow, and probably about 500 tons burthen. Immediately she was reported the pilot ordered the helm hard a-port, and I at once saw the man heaving the port helm, and I could see by her head that our ship answered her port helm, but not a great deal; she answered her port helm as quickly as a large ship generally does. Word then came from forward that there was another vessel right ahead; the report was, 'A vessel right ahead, and we shall be right into her.' I cannot say who made that report, but it was one of the people forward on the look-out. The pilot, upon that, said to the men at the wheel, 'Port;' that would be, to keep the helm to port as it was, meaning, as I understood him, that they should, notwithstanding, still keep the helm hard a-port; but the master sung out 'Starboard.' I do not know which order was obeyed, but I do not think either of them was, for I looked into the cockpit and saw the men first heaving on one side and then on the other." Now, I will put before you the evidence as to this part of the case from Anderson. Anderson says this: "I heard from the fore chains, where I was then standing, the skipper say to the pilot, just after we struck the Aberfoyle, and before we got clear of her, 'I know you did wrong.'" Now, that is to say, he did wrong in starboarding his helm, if it has any meaning at all. But, gentlemen, when we are looking at the question as to whether this evidence supports the statement of Wilson, it certainly does not, though it is not unimportant, for another reason. I will tell you why it is not. According to the evidence of Anderson, the master finds fault with the helm being starboarded; according to the evidence of Wilson, the master says, "Starboard." Now it is manifestly inconsistent for a man to order the helm to be starboarded, and, immediately after the collision, to find fault with the pilot for the way the helm was put if it was starboarded. That it is inconsistent is very true, and I am bound to point out to you that it is strong evidence, exceedingly strong evidence, that there was a discussion as to which way the helm should be put, and there was a sort of conflict between the pilot and the master. Now, gentlemen, I am the more satisfied of this when I look at the evidence of the second mate; he says, "I cannot be sure about it" — that is, whether the master cried "starboard" first, or the pilot first — "I cannot be sure about it." No orders were given by the master during the time interrogate, except that he ordered the helm a-starboard after the Aberfoyle had been reported, and the pilot had given the same order. "I cannot be sure about it, but I think it was after the pilot had ordered the helm to be starboarded, that the master also gave the order." Of course, if that was so, no blame attaches to the master for repeating the pilot's order — that is merely his duty. "I remember he said something to the effect, that if the helm was pressed one way or another we should clear her, but I cannot depose more precisely." It is quite manifest that the master, upon that occasion, was complaining of the shifting of the helm first

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one way, then another, and was declaring his judgment, that if it had been kept from the beginning one way or the other, there would have been a probability of avoiding the collision; and that certainly does support the testimony of Wilson, which I have already adverted to, so far as it goes. Now, Wilson—for I need not detain you by going through it minutely—you are aware that Wilson subsequently states expressly his opinion that the collision arose from the contradictory orders given to the seamen at the helm, and the helm put about instead of being kept steady; and owing to that the collision, in my opinion, happened, and he goes on to say they had a good look-out. Having premised this, the questions which I will put to you are these: First, whether you are of opinion that a proper look-out was kept on board the Lochlibo? secondly, as to whether the starboarding the helm was a right or wrong measure? thirdly, as to who was to blame?—that is the most essential to all parties. If the starboarding of the helm was a wrong measure, then, in considering that, we must take this into consideration, whether the starboarding of the helm was rightly done, or whether you can suppose that a pilot of the experience of which Thornton appears to have been, would, under the circumstances, have directed the helm to be starboarded unless something peculiar had occurred to induce him to adopt the measure; that will be a point, I think, for your consideration. Now, gentlemen, I will only say one word as to what is interference and what is not. It would be impossible to lay down a general rule. I should never go the length of saying that suggestion was interference; for instance, the master suggesting to the pilot to take in this sail or not; to keep as near to the South Land Head Light or not; or to bring the ship up: this is not interference—interference is a different thing. Interference is doing that which the pilot alone ought to have done. Where an act was done, or an order given, it would be interference; if the boatswain called out to the persons below, “Starboard the helm,” that would be interference, because it would be impossible, in many instances, for an order of that kind to be counteracted; it would be interference if the master called “Port the helm,” or “Starboard it;” but it would not be interference to consult the pilot, or to suggest to him that measures were not proper, or such other measures in all probability would be attended with greater success. This is all, I believe, so far as I recollect, that relates to the case of the Lochlibo. [Dr. Lushington, after consulting with the Trinity Masters, proceeded.] The gentlemen of the Trinity House, by whom I am advised, are of opinion, and I quite agree with them in entertaining that opinion: first, that this collision was not the result of inevitable accident; secondly, that it was wrong, on such a night as this is described to have been, to go through the Downs with such sail as this vessel carried, but the so doing was entirely within the department, if blame follows, of the pilot exclusively; thirdly, we do not think sufficient evidence has been produced to prove that a look-out was kept, such as the state of the weather required; fourthly, we think the starboarding the helm, just after the helm had been hard a-port, and the ship was under the influence of the port helm, was an

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erroneous measure; fifthly, we think the pilot is not exclusively to blame for the starboarding of the helm, and the consequent collision, but there was undue interference with him.

THE *MARIA JANE*.¹

August 7, 1850.

Salvage — Liability of Ship for.

The crews of two ships, belonging to J. L., gave some assistance to a ship chartered to J. L., who was bound to provide and pay the master and crew of such ships, the cargo on board of which belonged to J. L.:—

Held, in a suit against the ship, that no salvage could be claimed.

By charter party, J. L., the charterer, was to provide and pay the master and crew. The ship being on the coast of Africa, and some of her crew having died, the crews of two other ships belonging to J. L. rendered some assistance to the chartered ship. The cargo belonged to J. L. An action was entered on behalf of the masters and crews of these two ships.

Addams and Bayford, for the salvors.

Sir J. Dodson, Q. A., and Robinson, for the owners of the ship.

DR. LUSHINGTON. This is a cause of salvage promoted under very peculiar circumstances, which it will be necessary to state in detail. The suit is brought on behalf of the owner, masters, and crews of the *Rapid* and the *Mary*, against the *Maria Jane*, the cargo, and freight. The action was entered at the sum of 3000*l.*, but the warrant was executed only as regards the ship and freight. An appearance was given for the owners of the ship; nothing appears to have been done as to the freight. Bail was given for the ship only on the agreed value of 550*l.* Looking at these proceedings exclusively, it is obvious that, assuming a salvage service to have been performed, the question would be, what amount of salvage should be decreed with reference to the united value of the ship, freight, and cargo, and what proportion thereof the ship should defray, neither the cargo nor the freight being brought at present within the power of the Court, and the whole expense of the suit, under such supposition, being thrown on the ship. The facts, however, disclosed in the act on petition, explain why the cargo has not been proceeded against, namely, that it is the property of Mr. Lilley, the owner of the *Rapid* and the *Mary*. He, of course, could not proceed for salvage of his own property, and the masters and crews of his own two vessels have not thought fit to do so. As to the freight, the charter party explains the manner in

The Maria Jane.

which it is to be paid, but nothing further is stated in these proceedings with respect thereto. The duty of the Court, then, is this: first, to ascertain if any salvage is due; then the value of the ship, freight, and cargo; the amount of salvage proper to be given with reference to the united value; and the arithmetical proportion due from the ship herself. First, as to the principal question, whether any salvage can be claimed. It appears that the *Maria Jane* was chartered by her owners to Mr. Lilley, who is now claiming salvage, and that the charter party is not of the ordinary description. Generally speaking, when the owners charter a vessel, they retain possession of her, and appoint the master and crew. The present charter is of a different tenor, and though not of very frequent occurrence, is still well known to the law. The effect of the charter party is to divest the owners of the ship of the possession and control over the vessel; for the following are the conditions: "That the ship shall be equipped with naval stores, &c., by her owners; that she shall take a cargo from Liverpool to the coast of Africa, and bring back palm oil. All the expenses are to be paid by the charterer, except the vessel should from accident put into port for repairs. The charterer is to provide and pay the master and crew. The freight is to be 720*l.* for eight months, more if longer detained; 300*l.* to be paid on the vessel leaving Liverpool." Under this charter party the ship sailed from Liverpool on the 23d December, 1848. The act on petition, having stated the charter party and the commencement of the voyage, contains an averment that the ship was not properly found in stores; but that is wholly irrelevant to the present case. The ship reached the river Rio Bento in February, shipped two hundred and fifteen tons of palm oil, principally belonging to Mr. Lilley, by the middle of July, and then dropped down the river. The act then goes on with a history of the occurrences which happened to the ship till the 24th August; she then prosecuted her voyage, and arrived at Liverpool in December. The act concludes by claiming salvage upon the ship and freight. It may be here well to observe, that, assuming the statement to be proved, there can be no doubt that a part, at least, of the services detailed are in the nature of salvage services. The answer also sets forth the charter party, but that must be construed from its contents. It is alleged that the crew were insufficient and incompetent; but I doubt the relevancy of this averment, for, if true, it would be a breach of the charter. The material part of the answer is, that Mr. Lilley was the owner of the *Rapid* and the *Mary*; that the masters and crews of all the vessels mutually assisted each other; that several of the crew of the *Maria Jane* died; that all the masters and crews were Mr. Lilley's servants; that the difficulties, if they really occurred, arose from the acts of the masters and crews of the *Rapid* and the *Mary*. In the reply it is said, that Dove, the master of the *Maria Jane*, was, as to many purposes, the agent of the owners of the ship, and that the insurers of the cargo had paid 25*l.* per cent. to the parties to this suit on 6000*l.*, the agreed value of the cargo. If the parties now suing as salvors were wholly unconnected with the ship and cargo proceeded against, it is clear that some salvage would be due. The present circumstances are

peculiar. I am not aware of any previous case sufficiently resembling the present to afford a precedent. I must decide it on principle. The parties suing must bring their action in different characters. Mr. Lilley is the charterer of the ship salvaged, under a special charter party, to which I have already alluded, and he is the owner of the cargo. The ship is entirely under the control of himself and his agents, the master and crew hired by himself, and he is bound to find and keep up the crew. Under these circumstances, and looking also to the nature of the service rendered, I am of opinion that Mr. Lilley is barred from claiming salvage for the assistance rendered by his ships, the *Rapid* and the *Mary*, by the peculiar relation in which he stood to the *Maria Jane*, as charterer in possession. Suppose the case had been reversed, and that similar services had been rendered by the *Maria Jane* to the *Rapid* or the *Mary*, could the owners of the *Maria Jane* have claimed salvage? I apprehend, certainly not. So far as it relates to any claim in this Court, it is at least doubtful whether the owners of the *Maria Jane*, in that case, could have obtained salvage even for services rendered to some ships wholly unconnected with either party. I incline to the opinion, that the salvage would, by virtue of the charter, have enured to the benefit of the charterer in possession. There is another reason which operates on my mind, namely, that the main object, for the attainment of which the assistance was given, was the preservation of the cargo belonging to Mr. Lilley himself, and which was so blended with the safety of the ship, that the two objects could not be separated. So far, then, as relates to Lilley, I must pronounce against his claim for salvage. With respect to the claims of the masters and crews of the *Rapid* and the *Mary*, certainly, in some respects, they stand in a different position. Are they salvors — persons having no relation to the ship and cargo, and volunteering their services; or are they only acting as the agents and servants of Mr. Lilley? If the first character attaches, then they would be entitled to salvage; if the latter character belongs to them, then the case will require further consideration. It was well observed by Dr. Bayford, that whatever contract this set of salvors had entered into, concerned their own vessel only; and no doubt this is true; and this being so, I come to the consideration of the contracts which did subsist. I assume, that, by the ship's articles, in consideration of certain wages, the masters and crews undertook to perform their respective duties. To this extent the masters and crews of all three vessels are the servants of Mr. Lilley. I apprehend that no one could deny, that, in all ordinary assistance required in lading and unlading, mooring and unmooring, the owner or his agents would have a right to command that the crews as well the master should render mutual assistance. I think the so doing would strictly come within the contract "to obey all lawful commands." But if this be true as to certain assistance I have specified, does the same principle extend to salvage services? Could the master and crew of the *Rapid* claim for salvage services against the *Mary*? It may sometimes be difficult to draw the line precisely between assistance and salvage services. I am of opinion that the agent might lawfully command the master of

The Barefoot.

the Rapid to render ordinary services to the Mary or the Maria Jane; that the master might lawfully command the crew so to do; and that all such commands fall within the true construction of the contract entered into by the master and the mariners. The true test by which to try the right to salvage is, whether the service be within the contract or not. It appears that the Maria Jane had taken on board her cargo by the 18th July; that some of the crew died, but who does not clearly appear. She then proceeded, with the intent to pass the bar, with four seamen from the Mary, to form part of her crew, in lieu of some who had died, and also with Edward Porter, the master of the Rapid, with seven of his crew, as extra hands, to assist in getting over the bar. All these, in my judgment, formed, in legal consideration, a part of the crew of the Maria Jane. The vessel proceeds till she comes to the bar, when she anchors. Her cable gave way, and it was necessary to get her up the river again; and these services were performed by those on board of her before the accident. As relates to those services, I consider them to be exactly in the same light as if done by the original crew. Who are these salvors? The servants of Mr. Lilley, commencing these services actually as a part of the crew he was bound to furnish. Can I ingraft upon an original crew salvage service? I think not. Then what is the rest of the case? That, at a subsequent period, Kemp, the master of the Mary, comes also on board, and coöperates with Porter in the protection of this vessel, lading and relading the cargo and stores. I think all these services were services which Mr. Lilley or his agents had a right to require the masters and crews of his own vessels to perform towards a vessel of which he was in possession as charterer, and for the safety of his own cargo, which, indeed, was the principal object, and for which the masters and crews could not claim against Mr. Lilley, nor, consequently, against her owners, by a suit for salvage in this Court against the ship. If Mr. Lilley has a claim for the stores supplied, the remedy must be found elsewhere. I pronounce against the claim for salvage in this case, and I must give the owners their costs.

THE BAREFOOT.¹

August 7, 1850.

Derelict — Salvage — Misconduct.

A ship, laden with lead and iron, sunk on the Shipwash Sand, and was there left by the master and crew:—

Held, that the ship was not a derelict; that the authority of the owners and underwriters remained; and the first finders, though they recovered part of the property, forfeited their claim to salvage, and became liable to the costs of a suit instituted by them as salvors, by reason of their subsequent misconduct towards, and forcible resistance to, the authority of the owners.

¹ 14 Jur. 841.

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THE circumstances of this case, which are not of a usual character, are fully stated in the judgment.

Haggard and Robinson, for the salvors.

Addams and Twiss, for the owners.

DR. LUSHINGTON. This is an action for salvage, brought by the masters, owners, and crews of five smacks, and the salvage is sought to be recovered on account of certain parts of the cargo, alleged to have been salvaged by them. The appearance, however, was given for the owners of the lead only. The action is entered for the sum of 300*l*. The proceedings, I regret to say, are most voluminous, and certain mistakes as to dates have added to the bulk, and increased the complexity of the case. The value of the lead saved is stated to be 1600*l*. The vessel was wrecked on the 26th March, and, according to the statement of the salvors, to the south-east of the Shipwash Buoy. Edward Lewis, the master of the Endeavor, states that he so discovered her on the 27th; that on the 28th, he returned to Harwich, where a conversation takes place with a Mr. George, an agent for shipping in that place, as to the employment of John Lewis. It appears that this John Lewis had a diving apparatus, but it is not averred that at that period the Lewises were employed, either the one or the other, as to the salvaging of the wreck, either by George or any one else. On the 29th, Edward Lewis goes to his brother on the Heap Sand. On the 30th, according to his own statement, having conferred with his brother, he went to the wreck, which he alleges he found in the same state, with no vessel near her, but a wreck buoy had been placed by the Trinity officers, and for the two next days, viz., the 31st March, and 1st April, Edward Lewis was employed clearing away the wreck, and preparing for the divers; that John Lewis came with his diving apparatus, but that for several days they could not act, in consequence of the weather. The Endeavor, however, was near the wreck, the whole time. It is then averred, that during May, June, and July, they recovered certain articles, to the value of 600*l*: *prima facie*, there can be no doubt that this statement sets forth a case of salvage. The answer alleges, that an agreement with one John Deane was made by the underwriters, on the 3d of April, to raise the cargo; that Deane, in partnership with Edwards, with the Lalla Rookh, left Whitstable, on the 6th April, with the intention of proceeding to the Barefoot; that they took with them a gentleman of the name of Wood, an agent of Lloyd's, who had nothing to do with the Barefoot, and was desirous of going to the wreck of the Syne, respecting which he was employed, which was lying near the Heap Sand. The Lalla Rookh returned to Whitstable with Mr. Wood, and on the 10th April, came to Harwich. It is distinctly alleged, that, on the 6th April, Deane told the Lewises, that he was going to the Barefoot, under an engagement from the underwriters to salvage the cargo. The owners, or rather, the underwriters, — for they are the real parties in this case,

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— then charge that John Lewis, knowing of this engagement, went to Harwich, and procured surreptitiously an agreement from George, for salving this cargo, which was countersigned by the receiver of droits. Upon this fact coming to the knowledge of Deane, a letter was written at his instigation by Mr. Poole, the chairman of the committee at Lloyd's, and who was principal agent of the owners. It was directed to George, requiring him to withdraw his authority previously given to the Lewises, and this authority was, in consequence, withdrawn on the 16th April. It is further alleged, that, on the 12th April, Deane's party took possession of the wreck; that they were interrupted in their proceedings by the Lewises; and that Captain Saxby, who commanded the cruiser Scout, was ordered to protect them, in consequence of directions having been sent from those in authority over the coast-guard. They state that an attempt was made, on the part of the Lewises, to drive the Lalla Rookh from her moorings; that, in June, Captain Anderson was sent down from London, for the further protection of Messrs. Deane and Edwards, and he, as alleged, was attacked in his boat, by a party of the Lewises. It is also said that part of the cargo was not raised in consequence of this interruption, and that great and unnecessary expense was incurred by the owners and underwriters. The reply denies that the engagement with George was procured surreptitiously, and that Deane disclosed, on the 6th April, to the Lewises, his engagement previously entered into with Poole. They admit the notice to discontinue, but say they were not bound to obey that notice, or to abandon their proceedings, already commenced. They further allege, that, by agreement with Deane, they each took different hatchways, and so proceeded with the work; and they say, that, on the 22d June, Mr. Poole wrote to Mr. Billingsly, recommending that the Lewises should be allowed to act in conjunction with Deane, and that they were so. Accordingly, on the 22d June, they say, a large part of the cargo was saved, and they deny all molestation either of Deane or Captain Anderson. I think it clear, that, until the time, at least, that the Lewises were apprised of the employment of Deane and Edwards, they were fully justified in taking any steps preparatory to salving the cargo; for at that time, supposing there was no one to prevent them from so doing, I conceive they were entitled to be paid for their labor and trouble, even if they had not salvaged any part of it, if they were prevented from continuing their work. But it is another and a different question, whether they were entitled to persevere after they had received notice of this engagement with Deane. There is very strong evidence that such notice was given on the 6th April, and I think it is confirmed by all the *res gestæ* — by the steps adopted by the Lewises, by their proceeding to Harwich, and the conference with George: still, as there is no direct evidence as to the individual to whom such communications were made, nor of the terms in which the information was conveyed, I will give the salvors the benefit of possible ignorance, and I will assume that they did not receive such notice from Deane, on the 6th April, when he was on the Heap Sand. It is admitted, however, that the Lewises

were expressly informed by Mr. George of the engagement with Deane; that Mr. George withdrew the authority he had previously given, and forbade them to interfere further. The question is, therefore, whether they were justified in further interference. It is contended that they were, on several grounds: first, that the Lewises were the original finders; secondly, that they had authority from George, which he could not withdraw without, at least, the payment of the expenses. With respect to the first reason, even assuming it to be founded in fact, which is not proved to my satisfaction, I think it cannot be sustained in law under the circumstances of this case. Here is a ship, laden with lead and iron, sunk on the Shipwash Sand. The master and crew escape. True, there was an impossibility for any one to retain the actual possession; but there was not, and, indeed, could not, be an intention of abandoning the property, the local situation of which was well known, and which must have remained immovable till human skill was applied to its recovery. The property was indeed left, but not abandoned. It was not a derelict, neither does this case resemble that of a first salvor, who comes on board with the consent of the master and crew. The authority of the owners and underwriters remains, in my opinion, and they have a right to employ what means and what persons they like to secure their own property. The consequence of a contrary doctrine would be, that all the ships sunk in the River Thames would be at the mercy of the first finder. The case of a ship abandoned at sea is essentially different. In the one case the ship is driven at the mercy of the wind and waves, and immediate aid is necessary; in the other, the property is stationary, and those entitled to it can have access to it. With respect to Mr. George's authority, I think that, assuming he had power to make an engagement, he had also power to cancel and put an end to it; but, in fact, he had no authority from the owners of the lead, who are the parties defending this action. There was no possession to be retained. I am of opinion, that on neither ground were the Lewises justified in their interference with the wreck, subsequent to Mr. George's revocation of authority. Had they not so interfered, they would, in my opinion, have been entitled to sue for a recompense for their previous exertions. But the salvors further say, they continued their exertions subsequently, on a species of mutual understanding with Deane and Edwards. This is denied; it is, indeed, a most improbable fact, and it is not proved to my satisfaction by the evidence in the cause. But I am convinced that this averment is wholly untrue. Lastly, it is alleged that, in consequence of a letter from Mr. Poole to Mr. Billingsly, recommending that they should be employed with Deane and Edwards, they did, from the 23d June, so act in conjunction with them. How the contents of this letter were communicated to them, or whether Mr. Billingsly made such communication, the Court is not informed. This letter is not produced, of which the Court has just reason to complain. If the Court is led into mistake about it, the blame must fall on both parties, who have not supplied the proper legal evidence. I think it is scarcely possible that Mr. Poole could pardon all that had passed;

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the outrageous conduct was clearly proved by the evidence in the cause, especially by the evidence of Captain Saxby and Captain Anderson. I believe nothing so improbable. I believe that the truth is, that the underwriters, wearied with the past conflict, and anxious for the preservation of the property, simply withdrew active opposition; that this is no condonation for the past — no authority for the future. I am of opinion that the Lewises, and their party, if they had any claims on account of their early exertions, have forfeited them by their subsequent gross misconduct, and forcible resistance to the will of the owners, and the just interposition of Captain Saxby; and their unwarrantable interference, despite the many warnings received from Mr. George and the receiver of droits. I think their conduct throughout is most censurable, that they are not entitled to salvage, and that it is my duty to pronounce against their claims, with costs.

THE LOUISA BERTHA.¹

November 14, 1850.

Seamen's Wages — Continuous Voyage.

A Prussian ship sailed from Memel on a voyage to England; she afterwards made other voyages, in the last of which the master executed a bottomry bond on the ship, freight, and cargo. The ship was sold in this country at the suit of the bondholder, and the proceeds brought into the registry. The proceeds and the freight were not sufficient to pay the bond, interest, and costs. The mate and crew entered an action for their wages from the time the ship first sailed, claiming, as against the owners of the cargo on the last voyage, a right to be paid out of the proceeds and the freight: —

Held, that as the contract of hiring showed a continuous contract, the wages sued for were a lien upon, and should be paid out of, the proceeds and the freight.

THIS was a suit for wages, promoted by the mate and seven seamen of the Prussian ship Louisa Bertha, against the ship and freight, in which an appearance was given by the owners of the cargo, who prayed to be heard on their petition, in objection to the payment out of the proceeds of the sale of the ship and freight, of a portion of the wages scheduled, until after a bottomry bond upon the said ship pronounced for in this Court, and the costs of establishing the same, should have been satisfied out of the said proceeds and freight. The act on petition alleged, that the ship sailed from Memel in March, 1848, with a cargo, which she discharged, upon payment of freight, at her port of destination; that in the years 1848 and 1849 the ship made other voyages, and earned considerable freight, and in November, 1849, sailed from Alexandria, bound to a port in Great Britain and Ireland, or to a port between Havre and Hamburgh, calling at Cork or Falmouth for orders, in the course of which voyage, the master, for securing the re-payment of a certain sum of money, with the maritime

¹ 14 Jur. 1007.

premium thereon, executed the said bottomry bond, binding the ship, cargo, and freight; that the ship having arrived in England, the holder of the bond arrested the ship, cargo, and freight; that bail was given on behalf of the owners of the cargo, so far as regarded the cargo and freight, but no appearance being given for the ship, she was sold by authority of the Court, and the proceeds, 697*l.* 5*s.* 8*d.*, subject to deductions to the extent of 30*l.* or 40*l.*, brought into the registry; that the freight due for transportation of the said cargo was 303*l.* 8*s.* 9*d.*, but that the said sums of 697*l.* 5*s.* 8*d.* and 303*l.* 8*s.* 9*d.* were not sufficient to pay the sum of 1002*l.* 8*s.* 11*d.* secured and due upon the said bond, a portion of which, and all expenses incurred in recovering the same, would have to be paid by the owners of the cargo. The act then alleged, that the greater part of the wages sued for and set forth in the schedule was earned in voyages preceding the voyage in which the said bond was granted, and, if well earned, might be recovered against the master and against the owners of the ship; whereas, if the whole of such wages be decreed to be paid out of the proceeds of the ship and the freight, a corresponding portion of the said bond would have to be paid by the owners of the cargo, who would have no means, at law or in equity, of recovering the same, or any portion thereof. And upon these grounds it was submitted, that until the said bond, and the costs incurred in enforcing the same, shall have been satisfied, the seamen were not entitled to claim, from the proceeds of the ship and the freight, any wages earned prior to the voyage in the course of which the bond was granted. The answer, referring to the mariners' contract, alleged, that the hiring was from Memel to England, and to such other seaports and places as the master and owner of the said ship should order, and to remain on board until the said ship should be brought back to Memel, or arrive at some port where, in the stead of those seamen who might desire their discharge, substitutes might be obtained; that no settlement had been made in respect of the wages earned, save as to certain small sums received from time to time on account; and that, irrespective of any power which, under the circumstances, the said mate and seamen might or might not have of enforcing their wages at Memel against the master and owners, the said wages ought to be paid out of the proceeds before the said bond, or any part thereof, be discharged out of the said proceeds. The mariners' contract contained, amongst others, the following conditions: "They, as well the mate as also the rest of the seamen, bind themselves to sail with the ship's captain, C. F. Quade, and on board of his before-mentioned ship, from Memel to England, and also to other seaports and places whithersoever the skipper may deem fit to proceed, or the owners of the ship shall order, and to remain on board until the ship be brought back to Memel, or do arrive at some one place of discharge, where, in the stead of those seamen who peradventure might desire their discharge, other serviceable and able-bodied seamen might be obtained," &c. "The amount of two months of hire is paid in advance to each of the crew, but of their wages to be subsequently earned they must not make further demand until they arrive here (at

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Memel) with the ship, and are discharged from the vessel. But least of all must the crew request of the skipper to make them, out of the country, any payment for wages, either in full or in part, but must leave it entirely to his own discretion whether he will, of his own free will, pay any thing to them on account of their wages earned. Should, however, upon this voyage from Memel to England, or to any other place, freight be taken in, then the skipper binds himself, at the second place of discharge, when the other freight moneys shall be earned, to pay to him who asks it, or is in need thereof, the half of his wages standing due to him at that time. Should the crew be discharged, at the instance of the captain or of the owners, at a foreign port, or at a port in the mother country other than the one where this agreement shall have been entered into, they must be sent back, together with their effects, to the place of hire, either free of expense, or the money necessary for the journey, according to the distance, must be paid to them."

Addams, for the owners of the cargo, after referring to the statements in the act on petition. In *The Mary Anne*, 9 Jur. 94, it was decided, that where there are two creditors, one with a double and the other with a single security, the Court will compel the former so to resort to his double security as to enable the latter to be paid. So, here, the seamen have another remedy against the master or owners of the ship. And in the same case the Court threw out an observation directly bearing upon the present case. The words of the report are, "Suppose the wages sued for had been, in part, wages on the outer voyage, before the bottomry bond was taken, then would arise a question of no small importance, namely, whether these wages would be entitled, as against the ship, to priority over the bottomry bond. I apprehend not"—an opinion directly in favor of the case now made on behalf of the owners of the cargo.

Haggard, for the seamen. The general rule, that wages take priority of a bottomry bond, ought not to be departed from in this case; nor ought the mariners, who have a lien on the ship, to be sent to a foreign court to recover their wages from perhaps a bankrupt owner or insolvent master, when the proceeds, the fund upon which they have the first claim in all ordinary cases, are within the jurisdiction of the Court. *The Mary Anne* is not in point, for there the bond purported to bind only the ship; and the words which have been referred to, as used by the Court in the course of the judgment, are clearly by way of illustration, and cannot be made an authority. Even in a divided voyage, the mariner may claim the whole of his wages at the end of the last voyage. *The Juliana*, 2 Dods. 504. But here the mariners' contract shows the intention of all parties, that the wages were not to be claimed or paid till the ship came to the final port of discharge.

DR. LUSHINGTON. This is a suit for seamen's wages, and has been brought by foreign seamen on board a Prussian vessel, called "The

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Louisa Bertha," and the opposition to the suit is on the part of the owners of the cargo, who complain that if the Court decrees payment of the wages out of the proceeds of the ship, they will be damnified by the course so adopted, because the ship and freight will then be insufficient to discharge the bottomry bond, which has been pronounced for in this case, and part of the burden will thus fall on the cargo. The owners of the cargo contend that they ought to be relieved from that burden, and the seamen, instead of being paid from the ship and freight, should be left to take their remedy against the master or owners in a foreign country; except, indeed, that they admit that they could not successfully resist the payment of wages from Alexandria to this country, the voyage on which the bottomry bond was given. The general rule, no doubt, is this: That seamen's wages are considered as a lien on the ship, and are entitled to a priority as against all other claims, and those who impugn the validity of the rule are bound to show that the exception which is taken is one well founded. Now, as against the owners of the ship themselves, I apprehend, that, under all circumstances, the mariners would have a perfect right to be paid out of the ship and freight, even if the wages had been earned in two or three preceding voyages. The question now arises, whether the seamen have a similar right against the owners of the cargo. I must consider that in this case the parties suing are foreigners, and the Court exercises its jurisdiction only under circumstances which justify it in interfering in matters of compact between the crew and the owners residing in a foreign country. But, in this case, I am clearly justified in interfering, because, under the authority of the Court, the ship has been taken possession of and sold. In the first instance, I ought to see what are the terms of the contract by which the seamen were bound to perform their duties, because it is important to consider whether the last voyage was a separate and distinct one, or whether I am to regard all these voyages as being performed under one continuous and unbroken contract. By the first section of the contract, the seamen are to go to all seaports and places which the master of the vessel or the owners may deem proper; and the seamen bind themselves to remain on board, without any restriction as to the period of time, till the vessel shall return either to the place of shipment or to some home place of discharge. It is quite clear, therefore, that the voyage did not terminate with the first voyage to England, nor the second to Alexandria. With regard to the wages, it stipulates that two months' hire is to be paid in advance, "but of their wages to be subsequently earned they must not make further demand until they arrive here with the ship, and are discharged from the vessel." If the case stood there, the seamen would be prohibited altogether from asking or suing for wages till the arrival of the ship at the port of Memel. It goes on, "But least of all must the crew ask of the skipper to make them, out of the country, any payment for wages, either in full or in part." It leaves it to his discretion. But there follows this: "Should, however, upon this voyage from Memel to England, or to any other place, freight be taken in, then the skipper binds himself, at the second place of discharge, when

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the other freight moneys shall be earned, to pay him who asks it, or is in need thereof, the half of his wages standing due to him at that time." I apprehend the meaning is, that if there was any competent Court to take cognizance of the agreement, either at Alexandria or Malta, the seamen might have enforced their demand to the extent stated; but still it was not compulsory on them to do so. The 7th section is to the effect, that should the ship be laid up in winter quarters, the crew is then to be satisfied with the half of the wages stipulated in the contract. The 10th section provides, that "should the crew be discharged, at the instance of the captain or of the owners, at a foreign port, or at a port in the mother country other than the one where this agreement shall have been entered into, they must be sent back, together with their effects, to the place of hire, free of expense." This must mean that they are to be paid their wages at the port where they are so discharged. Now the effect is, these persons are of necessity discharged by the proceedings which have been had in this Court, and they would have had a right to come before the Court, and claim payment of their wages out of the ship and cargo; and I think they would not have been in the slightest degree prejudiced for not having made a demand for wages on the preceding occasion, when, according to the contract, they would have been fully justified in asking for a moiety. The question then arises, whether I shall leave them to make their demand against the owners of the ship or the master in a foreign country, or decree the wages out of the ship and freight, to the prejudice of the cargo. The act on petition on behalf of the owners of the cargo alleges, that the seamen have a claim against the owners and master which they might carry into execution; and therefore it is contended, that they ought not to be paid out of the ship and freight; and it is said that the same argument does not apply to the owners of the cargo — that they can have no remedy against the owners of the ship. I must say I demur to this proposition. It is perfectly true that the mariners might proceed against the owners and master according to the general law; but I have no doubt that the owners of the cargo may proceed against the owners of the ship. I have been pressed with the case of *The Mary Anne*, and with an opinion I am reported to have expressed in that case; but I find that the opinion so expressed was a mere dictum, and I will never hold myself bound by an observation so thrown out, and not called for immediately by the circumstances upon which I had to give my judgment. I certainly think it would be a very hard case upon the owners of the cargo to have their property subjected to bottomry, and afterwards, when the ship and freight are exhausted in consequence of the amount of the bottomry bond, that the cargo should be made subject, in consequence of the proceeds of the ship and freight having been diminished by the demands of the seamen, which demands originated in a service totally antecedent to the voyage in which the bottomry bond was taken, and in some instances to demands made by seamen who have quitted the vessel two or three years before; but I do not pretend to pronounce any judgment on that case at present. In the present instance, the contract must be viewed as a continuous con-

The Lady Anne.

tract, binding the mariners to remain on board the ship, whatever might be the number of voyages, until the contemplated event had taken place, that being the return of the vessel to the port of shipment or some other port mentioned in the contract. I consider that the seamen, in pursuance of the contract, were not at liberty to quit the ship, and that they have a claim as a lien against the ship and freight. It is said that great injustice will be thus done to the owners of the cargo. I am not prepared to say that it is so, because, when they shipped the cargo, they might have ascertained whether the ship had been out a considerable time, and whether she had on board a crew which had been earning wages. It appears to me, that, under these circumstances, I should be doing injustice to the seamen if I were to depart from the general rule, that wages are a lien on the ship. I do not say that that is a rule never to be broken down. I shall not depart from it in this case. I must therefore pronounce for the wages, or rather overrule the prayer of the owners of the cargo.

THE LADY ANNE.¹

November 22, 1850.

Collision — Rule of Navigation — Pleading.

The general rule of navigation, where two vessels are close-hauled and nearing one another, is, that the one on the port tack should give way, and the one on the starboard tack keep her luff; but this rule will not excuse the vessel on the starboard tack not taking other measures to prevent a collision, if circumstances render them necessary.

The pleadings should state the cause of the collision as accurately and distinctly as possible, leaving nothing to inference.

THIS action was brought by the owners of the Hope against the Lady Anne, and at the first hearing the learned Judge of the Admiralty Court ended his address to the Trinity Masters with these words: "The result appears to come to this — taking the statements of the Lady Anne to be true, from the beginning to the end she kept her luff. Are you of opinion that that was the right measure for her to pursue, or are you of opinion that any thing else ought to have been done to avoid the collision? Because, if the vessels were approaching each other, and either of them did not adopt the measures which ought to have been taken to avoid the collision, then, undoubtedly, blame must rest on the vessel which omitted to do what could and ought to have been done." In answer to this, the Trinity Masters said, "With respect to the vessel coming from the north," (the Lady Anne, which was on the starboard tack,) "there can be no doubt the master was near the helm, and there was plenty of time to have ported it, — to have done what they ought to have done to keep clear,

¹ 15 Jur. 18.

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—but they did not do it. She was kept steadily on; she was not hauled close to the wind, if the wind would allow it, nor was the helm altered, although they saw an accident would inevitably happen. There was a man on the look-out, and he ought to have eased off the head sheets to assist the helm, but this was not done." Dr. Lushington, in accordance with this opinion, pronounced for the damage, but, in so doing, he added, "In this case a great deal of difficulty occurred to the Court in consequence of the mode of pleading adopted. It is very desirable that parties, particularly when they commence a suit for collision, should furnish proctors and advocates with sufficient knowledge to enable them to draw up the pleadings with great precision. It is quite evident, in this case, that the point on which it has hinged has never been touched upon at all in the pleadings. I very much doubted whether I was at liberty, in the circumstances, to pronounce the decree which I have; but after great consideration before I came into Court, and on consulting with the Trinity Masters, I found their opinion was so clearly that those on board the Lady Anne must have known what their duty was, and that they ought to have ported their helm, that I did not think, especially in a case of this kind, that I was at liberty to refuse to do what was real justice in this case." The case was afterwards appealed to the Judicial Committee of the Privy Council, and in delivering their judgment, on the 6th July, Parke, B., said, "We have come to the conclusion to remit this case for further consideration. It appears to have been decided in the Court of Admiralty upon a point not pleaded in the act or raised in the argument of the respondent's counsel. If the appeal had been on purely nautical points, we should think ourselves scarcely at liberty to depart from it; or if the particular point had been brought before the Trinity Masters in the allegations or in the argument, we should think ourselves bound by it. Upon the ground, therefore, that the Trinity Masters have given advice to the Judge of the Admiralty Court on a point not mentioned in the act, we give leave to both parties to write again to the act, and adduce further evidence; but we give no costs on either side." The cause being remitted, the act was further written to on both sides. The averments stated in the judgment below were added; and the cause having been argued before the Court, assisted by the same Trinity Masters, —

DR. LUSHINGTON. It is now the duty of the Court, with your assistance, to review this case; and upon again considering the original pleadings, and the evidence thereon, together with the subsequent statement which has been made in the act on petition by the direction of the Judicial Committee, and the evidence also thereupon, to determine whether the former conclusion was an erroneous one, or whether you think it is right to advise the Court to persist in giving the same judgment, I hope and I trust that you will proceed to this inquiry with minds perfectly impartial, and not in the slightest degree biased by any thing that might have occurred on a former occasion, because, if any mistake has taken place heretofore, I am sure that you will agree with me, that we would much more readily confess

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ourselves to have been in error than persist in it. Now, it certainly is very desirable, in all these cases, that the pleadings should state the facts with precision, and should also state with accuracy the grounds upon which both parties rely. But I think that we must be also well aware, that, in matters of this description, it will be quite vain to attempt to expect perfect accuracy as to facts or pleadings, and for a very obvious reason.

In the first place, the instructions which are received are generally in a very loose shape, the statements having been taken by persons unacquainted with nautical matters, and who find it difficult to see the whole point of the case, and ask all those questions which are pertinent to the matter in dispute. You cannot wonder that this should particularly occur on the present occasion, when the master and mate were both drowned, and the statement had to be collected from what evidence could be given by a seaman and a couple of boys. I am happy to say that, when I addressed you on a former occasion, I was cautious, at the very commencement of my address, on one particular point, to which I will again call your attention. Having mentioned the death of the master and mate, and that the cause had thereby been deprived of their evidence, I went on to say, "It is right I should state to you that it is impossible for the parties suing to succeed in the cause, unless they shall be able to make out, by the evidence they produce, that the Lady Anne was to blame, or unless this is to be inferred from the statement on behalf of the Lady Anne herself, and the evidence adduced by her owners. I mention this, because if it so happens, as in this case, that a collision has occurred, and some of the persons on board one of the ships have been lost, we cannot supply their testimony by inference — we must rely solely upon the evidence in the cause." I repeat these expressions, for the purpose of warning and cautioning you, that, unless we have evidence that will satisfy our minds, we cannot supply its place by inference. I must now direct your attention to the original proceedings in the cause, to the questions which then arose, and the points which were then determined; and having again done this, I must recall to your minds what has passed before the Judicial Committee, and what additional questions may be suggested for consideration. The Hope, as you well know, is the vessel bringing this action, and in her original statement she says, "The schooner was about nine miles to the southward of Flamborough Head, and about four miles from the land, and lying close-hauled on the larboard tack, and was going about six knots through the water; that the night was dark and cloudy, and the wind blowing hard from the west-north-west." Now, if she was lying close-hauled on the larboard tack, I apprehend her head would be to the west. She then states, "that James Strange was in her bows keeping a good look-out, when a schooner, which afterwards proved to be the Lady Anne, was observed ahead of the Hope, and distant about two hundred yards, and the Lady Anne was then approaching the Hope close-hauled on the starboard tack." It is but justice to the parties proceeded against in this cause, that I should mention that this was the original statement made on the part

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of the Hope. If the Lady Anne was close-hauled on the starboard tack, supposing the wind was west-north-west, you will know which way her head must have been lying at the time. They say, "George Strange, one of the Hope's crew, hailed the master that there was a vessel ahead; that the said master immediately ordered the Hope's helm to be put hard a-port, which was immediately done, and one of the crew eased off the main sheet; that the master and two of the crew went forward and hailed the crew of the Lady Anne to keep her luff, but that no answer was received, nor was any light shown from the vessel." They go on to state the mode in which the collision took place. A question arose before, and of course will arise again, as to whether what was thus represented to have been done on board the Hope was a fit and proper measure to be pursued. You were of opinion, that, under the circumstances, it was. On the part of the Lady Anne it was said that the measures were not taken in time; you were of opinion that they were. On the present occasion you will have to consider whether you persevere in that opinion. It was further alleged, that "the collision arose solely through the carelessness, or mismanagement and want of nautical skill, of those on board the Lady Anne" — these are general words — "and that, had the Lady Anne kept her luff, as she ought and was bound to have done, the same would not have occurred." I commented on this on the former occasion, and I repeat that this is a most inconvenient mode of pleading. You are left to inference, and the consequence is not stated in direct terms. It is clear, however, that the cause of collision imputed by the Hope to the Lady Anne is, that she did not keep her luff. Now, the answer to that is, first, a denial as to the state of the wind; and it is alleged to have been west. It is said that the head of the Lady Anne was lying to the south; that she was close-hauled to the wind on the starboard tack. There has been much argument upon this; but I apprehend that the statement is not perfectly true, any more than the other; because, if the wind was from the west, and her course was south, she would not be close-hauled on the starboard tack. We have no means of determining precisely from what quarter the wind blew; it would probably be between the statements of the two vessels. The Lady Anne represents the night not to have been so dark as stated by the Hope, because they say they saw her half a mile off. It is pleaded that the Lady Anne, as she was bound, steadily kept her luff; and that the Hope, instead of giving way, which was her duty, kept on in a direction to cross the Lady Anne's hawse. You were of opinion that there was no evidence to satisfy your minds that the Hope did not give way, but quite the contrary; that she put her helm to port in due time, and adopted proper measures. After the case had been fully discussed, I addressed to you all the questions which arose, as clearly and distinctly as I could; and having duly considered the statement I then made, I am not prepared to say now that it was erroneous, or that there was any want of fairness or candor to any of the parties concerned. I then stated that the rule had been laid down over and over again, that if two vessels were ap-

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proaching each other, it was the duty of both to prevent a collision, if possible. No doubt there are certain rules as to what they ought to do under particular circumstances; but the first and primary rule is to avoid a collision, and the loss of property and life, if it can be effected with safety. You stated, in substance, on that occasion, that, assuming the Lady Anne to have kept her luff, she did not do all she was bound to do under the circumstances. You said, "With respect to the vessel coming from the north, there can be no doubt; the master was near the helm, and there was plenty of time to have ported it, to have done what they ought to have done to keep clear; but they did not do it." You were also of opinion that she ought to have done more than keep her luff—namely, to have ported her helm. The question as to whether she ought to have done any thing more than keep her luff had never been raised on the pleadings. You say that she ought to have ported her helm, and to have eased off the head sheets to have assisted it. On your advice I pronounced a judgment, which was afterwards carried up to the Judicial Committee. We have now two questions to decide—one a question of fact, and the other a question of nautical knowledge and experience. The question of fact will be, whether, looking at the subsequent plea, the Lady Anne did or did not do any thing beyond simply keeping her luff. If we determine that in the negative, then we come to the nautical question, Was she, or was she not, under the circumstances, bound to have done something more? On the former occasion I used these very words: "It is quite evident, in this case, that the point on which it has hinged has never been touched upon at all in the pleadings."

The case having been considered by the Judicial Committee, they remitted the case, and decreed that the conclusion of the act in the principal cause should be rescinded, leave being given to both parties to write to it again, and bring in additional evidence in support thereof. The owners of the Hope accordingly gave in another statement, and in that they allege, "that, at the time when the two vessels came first in sight of each other, the Lady Anne, though sufficiently near the wind to be considered as a vessel sailing close-hauled, might, in fact, have been hauled still closer to the wind than she was, without materially impeding her progress; that the darkness was such as to prevent either vessel being descried by the other until she had approached very close; that the crew of the Hope, immediately upon seeing the Lady Anne, put her helm hard a-port and eased off the main sheet," and so on. "That the crew of the Lady Anne, although they might have gone closer to the wind, on seeing the Hope, continued to pursue their original course, and did nothing whatever to avoid the collision; that had the crew of the Lady Anne ported her helm and eased off her head sheets, and thereby have brought her nearer to the wind, and even, if necessary, have thrown her up into the wind, the collision would have been avoided; but, instead of doing so, the Lady Anne adopted no precaution whatever." The effect of this must be looked at in two points of view: first, it is intended to say, that the Lady Anne was not so close-hauled as had been represented in the former

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pleading; and, secondly, it is intended to bring under the consideration of the Court the very point upon which the judgment has been founded, namely, that the Lady Anne ought to have done more than keep her luff, but did not do it. It is objected, on the part of the Lady Anne, that it is not competent to the Hope to make this statement. I am of opinion that the objection cannot be sustained. How is the statement met on the part of the Lady Anne? It is denied, "that whereas in the original act the blame imputed to the Lady Anne in respect of the collision in question, in effect, was that of not keeping her luff, which it was expressly alleged she was hailed to do by those on board the Hope, but starboarding her helm, it is competent, under permission, now to turn round, and expressly and in terms impute the collision to the Lady Anne having kept her luff and not ported her helm." Now comes the essential part — a denial "that it was either incumbent on the Lady Anne to have further ported her helm and eased off her head sheets, or that had she so done the collision would have been avoided, and which collision is alone imputable to the Hope not having ported her helm in time, or rather to her having starboarded her helm in the first instance." And it is alleged, "that the Lady Anne was then already luffed so close to the wind, that her sails were shivering at the time of the collision, and that had those on board the Lady Anne eased off her head sheets, they would have lost all command over her, the then state of the wind and sea not admitting of her going about; and when she would have made stern way, would have been struck, and in all probability sunk, by the Hope." In the first place, this is not a statement, in direct terms, that the Lady Anne ever ported her helm at all — it is but inference; and I am sorry to see that inference is resorted to on the present occasion, where so much difficulty had arisen from the want of clear pleading before. It is denied that it is incumbent on the Lady Anne to have further ported her helm. That assumes she had done it, which had not been stated before. With regard to the evidence to the facts here alleged, it is perfectly true, that of direct evidence of the facts asserted on behalf of the Hope there is very little, and if it depended on the evidence of Strange, it would go but a very little way. On the part of the Lady Anne there are four affidavits, and if not in the same words, they are of precisely the same import. The original plea on behalf of the Lady Anne was, that she, as she was bound to do, steadily kept her luff. What is the meaning of these words? I understand them to mean that they did not move their helm at all, but the schooner kept her course exactly as she was. The master of the Lady Anne, in his affidavit, says, "At the period of the collision in question, the Lady Anne was luffed up so close to the wind that her sails were shivering." Are we to understand by this, that she actually put her helm to port, and was luffed up to the wind more closely? It was sworn before, over and over again, that she steadily kept her luff, and they are entitled to the benefit of this — that the sails were at the time shivering. It is said that the head sheets were not eased off, and that there was no necessity for it. That is a matter of nautical experience. You will have to decide, first, what really

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was done on the present occasion by the *Lady Anne*, whether you are of opinion that she steadily kept her luff, that she did to some extent put her helm to port, and was so close to the wind that her sails were shivering; next you will have to decide what was the effect of not having eased off her head sheets. I must, however, advert to another point, and bring it to your consideration, because nothing is of so great an importance as that our rules and regulations should be distinctly understood. It is said, that when a vessel, close-hauled on the starboard tack, meets one close-hauled on the larboard tack, it is the duty of the latter to give way. That no one doubts. It is further said, it is the duty of the vessel on the starboard tack to keep her luff, and nothing else; and if she does so, she is exonerated from all blame if a collision should take place. It will be for you to advise me whether that be a rule or not in navigation. As to the general principle, I take the case to be this: that when two vessels, under the circumstances stated, are approaching close together, it is unquestionably the duty of the vessel on the larboard tack to give way with the greatest possible expedition; but I have yet to learn, that if there be any possible means of avoiding a collision, it is not the duty of the vessel on the starboard tack also to port her helm. Was it not incumbent on the *Lady Anne*, under the circumstances, to have ported her helm and eased off her head sheets? Would it have been a wrong measure, or, if it were proper, ought it not to have been performed in the usual seaman-like manner? [Dr. Lushington, having taken the opinion of the Trinity Masters, then said:] The gentlemen whose assistance I have been favored with have expressed their opinion in the following words: "We retain our opinion that the *Hope* was not to blame. We admit that the general rule is, that where two vessels are close-hauled, the one on the larboard tack is to give way, and the one on the starboard tack to keep her luff; this rule does not excuse the vessel on the starboard tack not taking other measures to prevent the collision, if circumstances render it necessary. In this case, we think the *Lady Anne* should have put her helm down, and have eased off the head sheets. These measures she did not adopt. Had this been done, we think the collision might have been avoided; therefore the *Lady Anne* is to blame." In the advice so given I entirely concur, and pronounce for the damage and costs.

THE BURE.¹

December 12, 1850.

Contempt of Court — Attachment.

AN attachment issued on the 3d December against the master of the Bure, on affidavits, deposing to his taking the ship out of the

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possession of the officer of the Court, with great violence and abusive language. The master had not been arrested, and the Court was now moved to supersede the attachment; and in support of the motion, affidavits were brought in, on the part of the master, stating that he had turned the man out of his ship through a misapprehension of the advice given him by the receiver of droits, that he had not used more violence than was necessary to put the man overboard, and that bail had been given in the action in which the ship was arrested, before he had so acted. There were also affidavits from many persons deposing to the general good conduct and character of the master.

DR. LUSHINGTON. I did not decree this attachment upon the ground that it was necessary for the purpose of obtaining justice to the parties proceeding in this cause. Represented by their proctor, they entered an action in the sum of 150*l.* against this vessel, and extracted a warrant. I was well aware on the 3d December, when the attachment issued, that an appearance had been given by the other party on the 29th November, and that his proctor had returned the commission, and executed bail in the sum of 150*l.*, and that the proctor for the salvors at that time declined to attend. Neither did I decree the attachment to issue on account of the improper language which it was represented, in an affidavit made by two persons, the master had used at the time he boarded her, and found her in the possession of a man, named Simon Garrod; but I issued it on account of this fact — that it was positively and distinctly sworn by the two persons who made the affidavit, namely, Crowe, that he duly executed the warrant, and Garrod, that he was in possession of the vessel; that a copy of the warrant was fixed to the mast, and he was forcibly ejected from that vessel. Nothing that has transpired has, in the slightest degree, tended to alter my opinion as to the propriety of the step I took in issuing the attachment. It must be obvious to all, that if I allow, on any pretext, a warrant, issued under the authority of the Court, to be forcibly superseded by parties, or should otherwise weaken the authority of the Court, it would tend to disputes and violence in the various seaports of this country; for other persons, relying upon an instance in which the authority has been disregarded, might think that they might repeat the same offence with impunity; therefore I say now, and ever will again, that there is ample remedy at law, if the warrant of the Court had been improperly issued; but if, after it had been duly executed, and a person put in possession, to enable the Court to do justice to the parties, the party so put in possession is violently ejected, in all and in every case I will attach the individual who does it; and not only so, but if I can bring within reach of the law any persons who have assisted in executing the dispossession, or have advised it, or aided it in any way, I will attach them all, and see how they will find their remedy.

What is the state of the case as it now presents itself to the Court upon the affidavits which have been brought in on behalf of the master? The attachment has not been executed, and no doubt the

object has been — and I do not mean to throw great blame on the master on that account — to avoid being attached and carried to jail, until an opportunity was given of bringing facts before the Court in extenuation of his conduct. I have an affidavit from the master, and what are the facts contained in it? It is not necessary to go through it minutely; but he says, when he went on board his vessel, he found Simon Garrod in possession of her; he ordered him to quit the ship, and, upon his refusing so to do, the deponent had him put into the boat, and landed at the nearest point to the said ship; but he says the same was done with only sufficient force to get him out consequent on his resistance; therefore he admits, in terms, that he did eject this man by force, only using sufficient force to effect his own object. He consequently admits the contempt of which he had been indisputably guilty. Now how does he justify this? By stating that there had been a previous proceeding, to which I will shortly refer. He says, that a demand had been made for salvage, but he refused to pay any thing; and that the vessel was seized under the authority of the receiver of droits. The vessel having been so seized, the case came before the magistrates, who dismissed the claim. Supposing this to have any effect at the time the warrant issued under the authority of the Court, the proper mode of proceeding was, to make an affidavit of the facts, and apply to the Court to supersede the warrant, which the Court would have done if the facts had justified it, and have condemned those who had it issued in costs. The master states, that, upon the case being dismissed by the magistrates, he went to the receiver of droits, to get the vessel released, and that Mr. Stephens, the receiver, told him that he need not be afraid, that he would take a bond for security, and that the bond was accordingly taken. The substance of the bond is, that the said Carrinton Harmer, &c., shall cause well and truly to be paid to the said smacksman such sums of money, if any shall hereafter be awarded by the High Court of Admiralty; and then the said obligation is to be null and void. He says, upon the bond being executed, with sureties, Mr. Stephens informed him, that it altogether superseded any other proceeding, as it effected the object of any writ that could be issued by the Court of Admiralty. I do not know whether Mr. Stephens did or did not give this advice; but if he did, it was very imprudent advice to give. He goes on to say, that Mr. Stephens told him, that if any person should attempt to seize the ship again for the same cause, he would be perfectly justified in removing him therefrom, and putting him on shore. I must presume that Mr. Stephens did not advise this gentleman, that if, under the High Court of Admiralty, a warrant was duly executed, he would be justified in putting an end to it by force and violence; but it may possibly be that he misapprehended what Mr. Stephens told him. Had it been clear, on the face of the affidavit, that Mr. Stephens advised him, in case a warrant should be issued from the High Court of Admiralty, that he would be authorized in dispossessing the officer, I should have caused a monition to issue to Mr. Stephens to show why he gave that advice. I do not, however, think that I am justified in putting

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so strong a construction upon what he said. This is the excuse, and I think there are extenuating circumstances; because, looking at the situation of life in which this individual is, it is not inconsistent with reason, that he may have misapprehended the advice given by Mr. Stephens. The remainder of this affidavit relates to circumstances peculiar to himself. I pass over the contradiction of the language said to have been used; it is immaterial to the issue. I never should find an attachment on the language used by seafaring men. The conclusion of the affidavit states, that Mr. Harmer has had the misfortune to lose two of his children, and his wife is on the point of death. Now, under the circumstances, what ought the Court to do, in justice to all parties? First, as regards the alleged salvors, they are in possession of adequate security, and they cannot ask for the attachment to be executed to aid them for any purpose they have in view. The Court has merely to look to the due assertion of its own authority, and what it thinks is right to be done, in order to preserve justice in future from being forcibly violated by any one whatever. I am of opinion that I shall do justice by superseding this attachment upon the master, but it must be upon the payment of all the costs.

THE CATHERINE, formerly THE CROXDALE.¹

March 3, 1851.

Bottomry — Sale of Ship.

A British ship, upon which a bottomry bond had been taken, payable on the ship's arrival in England, was sold by the master as unseaworthy, at public auction, and with the consent of the British consul, at Bahia, to a foreigner, who repaired her, changed her name, and sent her to England. There was no evidence of notice of the bond having been given at the sale:—

Held, that the ship was still subject to the bond.

THE facts of this case are fully set out in the judgment. The validity of the bond being admitted, the foreign owner relied upon the circumstances under which he purchased the ship, as a defence of his interest.

Harding, for the owner. A bottomry bond is in the nature of a wager; if the ship arrives at the port mentioned in the bond, the money and the maritime interest are payable; if she does not arrive, the money and interest are lost. This ship, in consequence of damage received at sea on her voyage, could not be repaired, except at a greater outlay than she would be worth when repaired. She was unseaworthy, was condemned, and sold. Her being subsequently repaired and sent to this country by a foreigner, who purchased her,

¹ 15 Jur. 231.

cannot give the bond validity — the bond was extinguished by her condemnation. The circumstance of the ship existing in specie at the time of the forced termination of the voyage is of no importance, for the loss was in its nature total to the then owners, who had no means of recovering their ship. *Roux v. Salvador*, 3 Bing. N. C. 266, is an authority in favor of the foreign purchaser, whatever may be the bearing of *Thompson v. The Royal Exchange Assurance Company*, 1 M. & S. 31.

Bayford and *Twiss*, for the bondholder. The case just cited shows the bond is not lost as long as the ship remains in specie. A bond has been upheld, where there was no laches on the part of the lender, even against a *bona fide* purchaser without notice; and where the risk on a bond has commenced, and a sale of the ship takes place, or the voyage is in any manner broken up by the borrower, the bond becomes presently payable. *The Draco*, 2 Sumner's American Rep. 157. *The Dante*, 2 W. Rob. 427.

DR. LUSHINGTON. Before I came into Court, I had not only very carefully read the whole of these proceedings, but bestowed much consideration upon them; and, having made up my mind, I see no reason for postponing my judgment. The question arises as to the validity of a bond, bearing date the 16th April, 1849, dated at Buenos Ayres, for the sum of 1315*l.* 10*s.*, which includes the maritime interest, and it is payable on the arrival of the ship in London. The vessel originally belonged to the port of Sunderland, and in June, 1848, sailed for Buenos Ayres, but put into Rio for supplies. Messrs. Whittle & Co. advanced on bottomry 583*l.* 16*s.*, payable on the arrival of the vessel at Buenos Ayres. When she reached there, on the 10th January, 1849, the agent for the owners declined to advance the money; it was, therefore, competent for the bondholder to proceed against the ship. He, however, consented to desist from hostile proceedings, and advanced the sum necessary to defray the expenses home, and took another bond for both sums. It is admitted that the bond is valid; but the defence has been put upon its true footing — namely, whether circumstances which have since occurred do not deprive the holder of his right to proceed against the ship for the purpose of enforcing it.

It appears that the ship put into Bahia; and it is alleged, on the one hand, that she was in distress, which is denied on the other. The Court has no evidence as to how the distress was occasioned. The ship was sold at Bahia; and now let us consider what are the questions of law which arise on this case. Assuming that there was a *bona fide* sale, by what means, when a ship has once been affected by a lien on account of a valid bond, can she be relieved therefrom, except by payment? If a ship is sold by the decree of a competent Court, it may be that the purchaser takes her free from all lien whatsoever. It must be presumed that the Court has protected him, so far as the law will allow, against all claims in the nature of lien. The question as to other sales may be divided into two heads — sales

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from necessity and sales without necessity. In the latter case, whenever the sale takes place, the purchaser must take *cum onere*, else the master might sell the ship in any foreign port, and so get rid of the bond. The effect of a sale by necessity is another and a very different consideration. Suppose a master had no credit, and no means of taking up money on bottomry, it may be questionable whether a purchaser would be justified in paying the purchase money over to the master, without any regard to the interest of a bondholder, supposing he knew that there was one. The mischief would be great if a ship could be so sold; a wide door would be opened to fraud, which scarcely any caution could prevent, and it would be exceedingly detrimental to the mercantile interests of the country. I should greatly doubt, whether, under such circumstances, a ship could be sold free from lien.

There was another question which was originally raised in this case, but which has been somewhat withdrawn from the attention of the Court, because it has not been earnestly contended — that the Brazilian law has been proved. It is very important, however, to consider what is the effect to be attributed to the law of a foreign country, where a sale of this kind takes place. We must carefully distinguish between the law of a foreign country, where a British ship is sold to a foreigner, and sales made by one ship owner to another, where the municipal laws of England must be strictly enforced; and we must also take care not to confuse these with sales under the direction of a competent Court. There was a period in the history of the sale of British ships when the law was held more strictly than it is now. The inclination of the Courts of Common Law went almost to the extent, that a master could not, under any circumstances whatever, sanction the sale of a ship abroad, unless invested with authority by his owners. *Reid v. Darby*, 10 East, 143. In later days I think a wiser view of this question has been taken, because I take the law now to be, that where an urgent necessity exists which the master cannot meet, it is competent to him to sell the vessel.

I will now look a little closer to the facts of the case itself. Has the sale arisen from absolute necessity, and been a *bona fide* sale? I will assume that the sale has been *bona fide*, because it is not necessary to agitate that question. There certainly is not any evidence to convince the Court that there was any *mala fides* on the part of the purchaser; whether there was any *mala fides* on the part of the master is another and a different question. His conduct is not at all satisfactorily explained on this occasion. It was in the month of May that the vessel put into Bahia, and the Court, as I have already said, is without any information as to what occurred on the voyage. The surveys made undoubtedly reported that the vessel, in order to be repaired, would require to have laid out on her a sum of money more than commensurate to her value, and that she was not seaworthy. It would have been more satisfactory to have had the evidence of the British consul, than to be told that the matter went on through him. However, a sale took place by public auction, and I ought to infer, in justice to the purchaser, that such sale took place

with the consent of the British consul. The purchaser alleges that no notice was given of any lien. Then come the questions—first, was notice necessary? secondly, if so, who ought to have given that notice? If the British consul was aware of the lien, it was his bounden duty not to sanction the sale, under any circumstances whatever, without causing public notice of that fact to be given. It was also the duty of the auctioneer, and *a fortiori* of the master himself, but from these individuals we have no evidence whatever. Who is the purchaser is also ingeniously concealed even from the proctor himself. It is alleged, on behalf of the purchaser, that he never saw the British register. Why, it is a matter of astonishment to me—notorious as it is that the British register is the great title to all ships, and that mortgages and bottomry bonds are indorsed upon it—that any man should go and purchase a British ship, even in a foreign port, without requiring to see the register. I do not mean to exempt from blame the master who did not show it, or the British consul who did not look at it, but it was an act of neglect on the part of the purchaser himself.

It is admitted, that when there is a lien on a ship, it can never be removed, except in a legal form; yet no inquiry at all is made upon the matter. There is one gentleman who represents himself as present, and declares that he heard notice, and there are five or six who state they were present and did not hear it. It may be, however, that the declaration took place when they were not present; but my judgment will not turn on the fact that notice of the lien was given. If the British consul, the auctioneer, or the master knew of the bottomry bond—and the master must have been aware of its existence, for he signed it—and concealed it from the purchaser, they were participators in effecting a fraud.

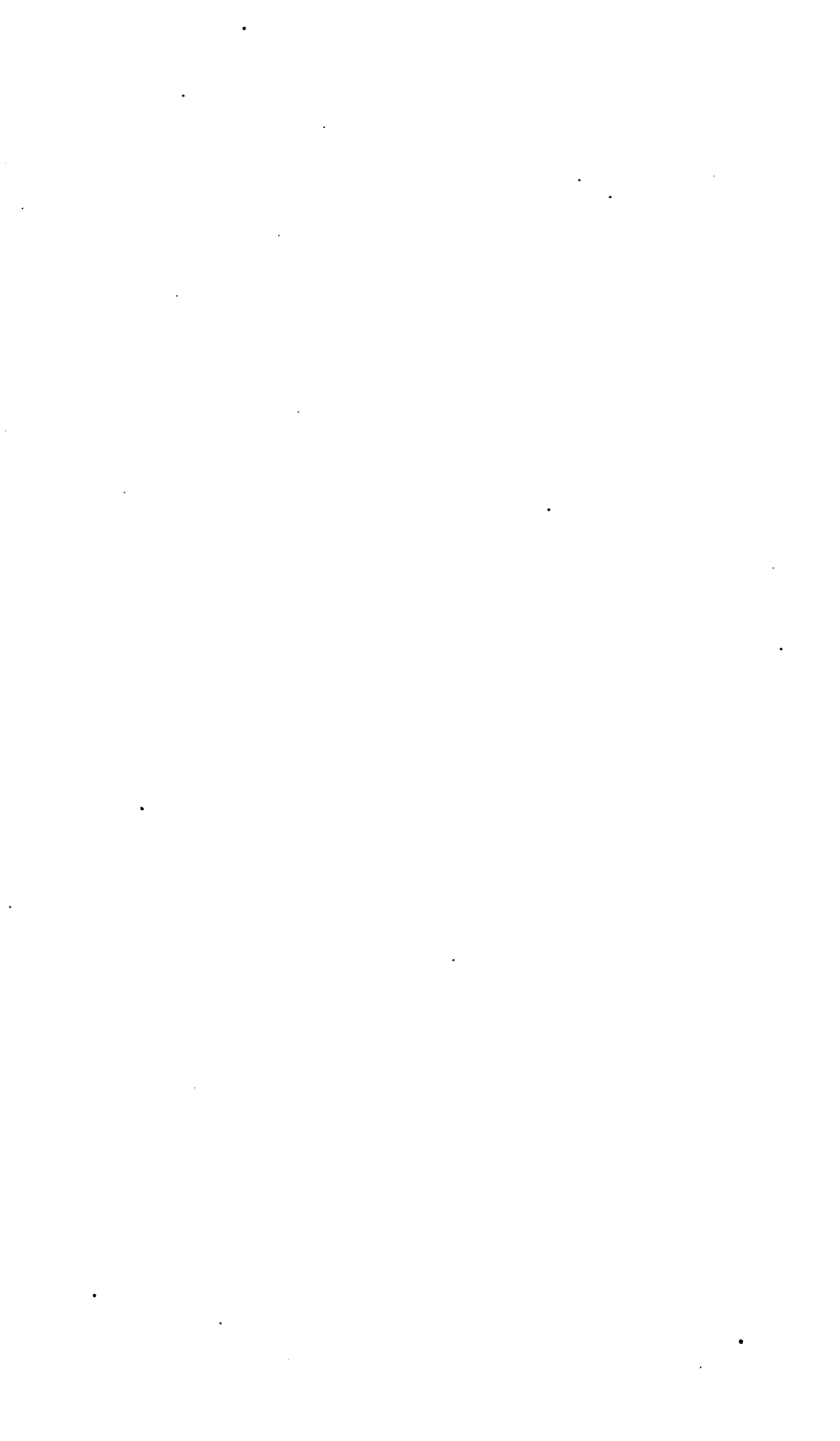
There is a fact which arises in this case, independently of all others, to which I must advert. I do not find it to be denied that money might have been borrowed on bottomry for the purpose of bringing the vessel home. If money could have been borrowed, there is an end of the necessity, and it is clear that the master had not authority, to sell the vessel. This is not the law of England peculiarly, but is the maritime law of the whole world, and that for the protection of all ship owners against all masters. I have not, therefore, to consider whether this is a case of necessity or not. But supposing the vessel could not have been brought to England, did the bottomry bond continue, or did it not? The case cited, *Thompson v. The Royal Exchange Assurance Company*, was an action on a policy of insurance upon a bottomry bond, and the question was, whether the insured could recover against the insurer, unless it was proved that the risk mentioned in the policy had actually taken place, and the bottomry bond was lost. In that case, Lord Ellenborough decided that the bond could not be lost so long as the vessel remained in specie. That was the law of this country long before Lord Ellenborough so declared it. If a ship was once bottomried, the bond attached to the very last plank, and the holder might have that sold for his benefit. I have no doubt that when the ship arrived at Bahia, if she was un-

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able to prosecute her voyage, the bond instantly became due. The condition was gone, and the bond was good. That is a doctrine laid down by Mr. Justice Story in *The Draco*; and that was the doctrine I held in the case of *The Dante*. I do not think it is necessary for me to enter minutely into the question as to whether all these repairs were requisite or not; perhaps the sum from 2000*l.* to 3000*l.* was requisite in order to make a complete repair; but, on the other hand, the vessel might have been brought to this country by laying out a smaller sum.

I have come to the following conclusion on the whole case. I think that a British vessel, coming into a foreign port, cannot be sold by the master, so as to confer a perfect title against his owners, and extinguish all mortgage claims and all liens on bottomry or wages, even in a case of necessity. I do not say that it might not be done where recourse was had to a Court of Justice and a decree was made; that would override all the considerations to which I have adverted. I apprehend that the general maritime law of the world is directly opposed to the sale of vessels in the manner in which this has been sold, and to the consequences attempted to be ingrafted upon it. I am of opinion that it is the duty of foreign purchasers to open their eyes, and to take care what kind of a bargain they make — that they guard themselves against liens which adhere to the ship. I am not satisfied in this case that there was any necessity for a sale, and therefore my judgment goes also on that lower ground. Having given, I think, due attention to the case, I am of opinion that this was originally a valid bottomry bond, and that it can be lawfully enforced against the ship. I also give the costs.

An affidavit to the deteriorating condition of the ship had been brought in some time before, and upon that the Court now decreed the vessel to be sold. The value was not sufficient to satisfy the bond.



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ADMINISTRATION SUIT.

Neglect of Administrator.] A plaintiff in an administration suit upon a reference for taking the accounts cannot include an inquiry as to wilful neglect and default, unless there is a specific charge to that effect in the bill. The general charge of neglect and default is not sufficient. *Sawyer v. Mills*, 186.

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AMENDMENT.

1. *Appeal.*] The plaintiffs, having amended three times, excepted to the answer. The exceptions were disallowed by the Court. The plaintiffs entered a *caveat* with a view to appeal, but finally abandoned their intention to appeal, and a year after the answer had been found sufficient, applied for leave to amend on the usual affidavit. Application refused. *Lander v. Weston*, 112.
2. *Notice.*] A motion for leave to add parties in a claim does not require notice. *Hayward v. Price*, 120.

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ARBITRATION AND AWARD.

Award, Validity of.] In a suit for an account of tithes, the defendants set up an award which declared that a certain sum should be paid in lieu of tithes, provided the whole lands were subject to tithes; but if only subject to tithes according to a specified terrier, then a different sum was awarded. The defendants' counsel also set

up at the hearing the statute 53 Geo. 3, c. 127, as a bar to the recovery of tithes for more than six years. The statute was not pleaded by the answer of the defendants: — *Held*, that the award, not being final, was void, but that the plaintiffs were only entitled to an account of tithes for six years before the filing of the bill. *Goode & another v. Waters & another*, 181.

See COMMON LAW INDEX, ARBITRATION AND AWARD.

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See WINDING-UP ACTS.

CONSTRUCTION.

Two Interpretations.] Where the words of a railway company's act are capable of two interpretations, but the general intent of the legislature is complete indemnification to the party whose land is taken by the company, the court will incline to that construction of the words which will make them consistent with the general intent. *Elton College*, ex parte, 51.

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COPYRIGHT.

Alien Author.] An alien author first published a literary work while resident in this country. An edition of the same work was published at Frankfort-on-the-Maine, and copies were imported into this country, and sold by a London bookseller. The alien filed a bill for an injunction to restrain the sale, and on motion, the same was granted, the plaintiff undertaking to bring an action if the defendants desired it. *Ollendorf v. Black*, 114.

CORPORATION.

See WINDING-UP ACTS.

COSTS.

1. *On Appeal.*] Where, upon appeal, the order of the Court below was varied, and, by inadvertence, the cause was heard on further directions by the Court of Appeal: — *Held*, that this circumstance ought not to affect the right of the successful party to those costs which he would otherwise have been entitled to. *Malcom v. Scott*, 72.
2. *Disclaimer.*] A mortgagor devised the mortgaged estate to a person who did not accept the devise, and did not take or claim any benefit under the will. A bill of foreclosure was filed against him, without any allegation that he had been asked to accept the devise. He put in a disclaimer, and the cause was brought to a hearing: —

Held, that he was entitled to his costs, to be paid by the plaintiff. *Higgins v. Frankis*, 71.

3. *Investment*.] The costs of obtaining orders for the investment of purchase money, paid by a railway company in alterations of almshouses, not to be borne by the company. *In re Buckinghamshire Rail. Co.* 99.

4. *Of intermediate Investment*.] *Eton College*, ex parte, 51.

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CREDITOR'S DEEDS.

See PARTIES.

CREDITOR'S SUIT.

Two Suits — Inquiries.] The bill in a creditor's suit was filed by a creditor entitled to the payment of a sum of money out of the intestate's assets, after the death of a person then living, and charged that the administratrix had carried on the intestate's business since his death at a loss, and had misapplied assets. Another creditor's suit was instituted, in which an inquiry was directed, whether the carrying on the trade from the date of the order was beneficial. The first suit having come to a hearing, it was held, that relief was prayed which could not be had in the second, and an inquiry was directed, whether the carrying on of the trade had been beneficial from the death of the intestate up to the date of the former order. *Underwood v. Jee*, 223.

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EJECTMENT.

See INJUNCTION. COMMON LAW INDEX, INJUNCTION.

EQUITABLE ASSIGNMENT.

1. *Mutual Correspondence — Contract*.] A Calcutta firm, writing to their agents and consignees in London, directed them, if in funds, to hold 10,625*l.* at the disposal of M., a creditor of the Calcutta firm, promising, if the funds were not sufficient, to make a further remittance upon general account; and by a letter of the same date, the Calcutta firm advised M. of the directions given to the London firm. The London firm received this letter on the 12th of March, 1841, and immediately advised M. thereof, stating that they were then in cash advance to the firm to a greater amount than the expected remittances were likely to cover; and concluded, "We have, however, registered the above, and should remittances or consignments come forward to enable us to meet their wishes, we shall lose no time in advising you." In 1842, the Calcutta firm revoked their order in favor of M. Upon bill by M. against the London firm and others, it was held by the Court below that the effect of the correspondence entitled M. to an account, as against the London firm, of the balance in their hands on the 12th of March, 1841, on their general account with the Calcutta firm, and of the consignments and remittances of the Calcutta firm to the London firm up to the revocation of the order, the London firm to have credit in such account for all dependences existing between them and the Calcutta firm on the 12th of March, 1841. Upon appeal, the Court directed the cause to stand over until the plaintiff had established his right by an action at law; and the final result of that action being, that the correspondence created no contract at law by the London firm to appropriate the proceeds of future remittances (after satisfying their then dependences) in satisfaction of the 10,625*l.*, the bill was dismissed. *Malcom v. Scott*, 72.

2. *Quare* — Where a mutual correspondence between a debtor and his creditor and the consignee of the debtor, as to the appropriation of certain funds in the hands of the consignee in favor of the creditor, is resolvable into a legal contract, whether a claim on the ground of equitable assignment can be maintained, independent of the legal contract. *Ib.*

EQUITABLE INCUMBRANCE.

See TRUST.

EVIDENCE.

1. *Primary Evidence.*] At the hearing of a claim for specific performance, the original contract must be proved and produced. *Marshall v. Davies*, 113.
2. *Evidence — Affidavits.*] Claims may be decided on affidavits on both sides on a contested matter of fact, or the Court may, if it sees fit, direct a bill to be filed, or direct proceedings at law. *Smith v. Constant*, 218.
3. When, at the hearing of a claim, a fact is alleged by the plaintiff on his own affidavit, (which affidavit the Court will not receive as evidence,) but which fact is not admitted by the defendant, the Court will direct the claim to stand over, in order that the fact may be otherwise substantiated. *Ib.*
4. The affidavit of the defendant has the same degree of weight as an answer. *Ib.*
5. *Privilege from Crimination.*] The plaintiff, contemplating stock-jobbing transactions through his brokers, transferred to them certain railway shares, for the purpose of securing to them any balance which might ultimately become due to them upon the contemplated transactions. Dealings and transactions accordingly took place. Plaintiff filed his bill against his brokers, alleging that there was a balance due to him upon those transactions, praying an account, and a retransfer of the railway shares; and the bill contained numerous searching interrogatories as to the stock transactions, and the ownership of the railway shares. The defendants, by their answer, denied that there was any balance due to the plaintiff, on the transactions in question, but that, on the contrary, a balance was due from the plaintiff to them: they then set out the 8th section of the Stock-jobbing Act, 7 Geo. 2, c. 8, and stated that the plaintiff had alleged, prior to filing his bill, that the transactions in which they were concerned for him were prohibited by that act of Parliament; and they declined to answer the other interrogatories, on the ground that they jointly and severally believed that the discovery would tend to subject them, severally and respectively, to the penalties enacted by that statute: —
Held, affirming the decision of the Court below, that the answer was not insufficient, and that the defendants were protected from giving the discovery under the rule, that a person shall not be compelled to criminate himself. Extent of this rule discussed. *Short v. Mercier*, 208.
6. *Semble*, the rule as to protection from discovery, on the ground that it may tend to criminate the party, extends to every interrogatory which the party swears would form a link in the chain of the evidence by which the supposed guilt might be made out. *Ib.*
7. *Certificate.*] The Court requires the registrar's certificate before the filing of an answer. *Bell v. Bell*, 121.

See WINDING-UP ACTS, 11. COMMON LAW INDEX, EVIDENCE.

FORECLOSURE.

See JUDGMENT. COSTS, 1.

FOREIGN ATTACHMENT.

Assignment.] L'E., an officer, retired from the army, in consequence of which his commission became salable. Being indebted to the plaintiff in the sum of 500*l.*, he gave him a letter to Messrs. Cox, army agents, requesting them to pay the balance of the price of his commission to the plaintiff, who sent the letter, with another of his own, to Messrs. Cox, requesting payment, but they had not then received any money. The plaintiff, having heard that an ensign had been gazetted, again applied for payment, and he received a letter informing him that the ensign gazetted was not in the succession of L'E., but that, after the 14th of June, he might draw on Messrs. Cox for 408*l.* 10*s.* 11*d.*, the balance arising from the sale of the commission. In the mean time M. S. obtained a foreign attachment from the Lord Mayor's Court against L'E. for 500*l.*, due on a bill of exchange, and attached the moneys, &c., of

L'E. in the hands of Messrs. Cox. The plaintiff then filed this bill, and upon an application for an injunction to restrain Messrs. Cox from parting with the money :— *Held*, that Messrs. Cox had recognized the plaintiff's demand, and that it amounted to an appropriation of the money to arise from the sale of the commission; and an injunction was granted. *L'Estrange v. L'Estrange*, 153.

FRAUD, ALLEGATIONS OF.

See PLEADING. COMMON LAW INDEX, FRAUD.

HEIRS AT LAW.

See WILL.

IMPERTINENCE.

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See WILL, 2.

INJUNCTION.

1. *Dissolution of.*] A bill was filed to restrain proceedings at law brought by three of the defendants, and the common injunction was obtained against the three. Two answered, and obtained an order to dissolve the injunction generally, which was made absolute, the third party not having answered. The defendants who had answered then issued execution against the plaintiff:—

Held, that they were not guilty of contempt of court in issuing execution, but that, under the circumstances, the orders *nisi* and *absolute* for dissolving the injunction ought to have been confined to the defendants who had answered. *Money v. Jordan*, 146.

2. *Semble*, on a proper case being made, the court will dissolve a common injunction obtained against three on the merits disclosed in the answer. *Ib.*

3. *For Damages to Real Estate.*] A party having, under the 68th section of the Land Clauses Consolidation Act, claimed compensation for injury alleged to be done to his property by the works of a company who disputed the right to compensation, an injunction was granted, on the application of the company to restrain the claimant from proceeding to ascertain the amount of compensation until he had established his right at law. *The Sutton Harbor Co. v. Hitchens*, 202.

4. *Against Railway Company taking Land.*] A railway company paid for and took a conveyance of a piece of land from D. W. afterwards claimed the land, and moved to restrain the company from taking it, their compulsory powers having expired. The evidence of title was conflicting between D. and W.:—

Held, that W. had his remedy by ejectment; and injunction refused. *Webster v. South-eastern Railway Co.*, 204.

5. *Dissolution — Doubtful Title.*] Injunction dissolved, plaintiff's legal title being doubtful, and the continuance of the injunction being unnecessary for the protection of plaintiffs, and injurious to the defendants. *The Shrewsbury and Birmingham Railway Company v. The London and North-western Railway Company, and The Shropshire Union Railways and Canal Company*, 122.

See EQUITABLE ASSIGNMENT.

JOINT STOCK COMPANIES.

Liabilities of Shareholders in.] See WINDING-UP ACTS.

JUDGMENT.

Subsequent Creditors.] Subsequent judgment creditors, whose judgment is registered under 2 Vict. c. 11, but not in the county register, are not necessary parties to a suit for the foreclosure of lands in a register county. *Johnson v. Holdsworth*, 143.

See RECEIVER.

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See WILL, 1.

LUNATIC.

This court will not take upon itself to inquire into the fact, whether a lunatic is a trustee within the meaning of the Trustee Act, 1850; there must be a reference to the Master to make that inquiry, according to the former practice. *In re Ramshey*, 200.

MAINTENANCE.

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MORTGAGE.

See COSTS. PRINCIPAL AND SURETY.

NEXT OF KIN.

See WILL.

NOTICE.

See AMENDMENT.

NUN.

See WILL, 1.

PARTIES.

1. *To a Bill in Equity.*] By a deed between A of the first part, B and C, stated to be creditors of A, of the second part, and the creditors of A who should execute the deed of the third part, A assigned his property to B and C, on trust to pay H. a sum of money in respect of a lien on some of the property, and to divide the residue among the creditors. B never executed the deed, and his executors filed a bill to set it aside. The bill alleged that B had died directly after the date of the deed, that C was a bankrupt, that H. had not any lien, and had acted improperly in the matter, and that it was the interest of the creditors who had executed the deed that it should be set aside. The only defendants were C, his assignees, and H.:—
Held, that one or more of the creditors who had executed the deed were necessary parties to the suit. *Gore v. Harris*, 184.

2. *Judgment Creditors.*] Subsequent judgment creditors, whose judgments are registered under 2 Vict. c. 11, but not in the county register, are not necessary parties to a suit for the foreclosure of lands in a register county. *Johnson v. Holdsworth*, 143.

See RECEIVER.

PLEADING.

Bill filed by the *cestui que trust* under a marriage settlement against the trustee to compel him to pay a sum of money, which the husband had covenanted to settle, but which covenant the trustee had neglected to enforce previously to the bankruptcy of the husband, which took place some years after his marriage. The bill alleged that for many years the husband was in prosperous circumstances, and the covenant ought then to have been enforced. The trustee, by his answer, stated as a reason for his not having been able to enforce the covenant, that the husband, at the time of his marriage, was in very needy and embarrassed circumstances, and continued so until his bankruptcy. The answer then set forth several transactions, alleged to have been fraudulently contrived by the husband, and that he had, in various other matters, both previously and subsequently to his marriage, resorted to fraudulent means to supply his wants and avert discovery of his true position. The Master had allowed exceptions to such passages of this answer as contained allegations of fraud against the husband, on the ground that they were scandalous and impertinent:—

Held, upon exceptions to the Master's report, that where the bill alleged solvency, it was not irrelevant for the defendant to introduce a statement of fraudulent practices committed from time to time to conceal the fact of insolvency. *Balguv v. Broadhurst*, 166.

See ADMINISTRATION SUIT. PARTIES, 1.

PRACTICE.

1. *Payment into Court.*] After a decree in a cause, a motion that the defendants might

pay into Court money which, by their answer, they admitted to be in their hands, was refused with costs. *Wright v. Lukes*, 94.

2. *Expense of executing Commission for the Examination of Witnesses.*] A commission for the examination of witnesses being issued, witnesses were examined under it, both by the plaintiff and the defendant. The Court held, that the defendant was liable to pay his proportion of the expenses of the execution of the commission. *Grove v. Young*, 217.
3. *Dismissal.*] Though executions for impertinence had been filed after the answer had become sufficient, the defendant had a right to move to dismiss. *Stuart v. Lloyd*, 100.
4. *Evidence — Affidavits.*] Claims may be decided on affidavits on both sides, on a contested matter of fact, or the Court may, if it sees fit, direct a bill to be filed, or direct proceedings at law. *Smith v. Constant*, 218.
5. When, at the hearing of a claim, a fact is alleged by the plaintiff on his own affidavit, (which affidavit the Court will not receive as evidence,) but which fact is not admitted by the defendant, the Court will direct the claim to stand over, in order that the fact may be otherwise substantiated. *Ib.*
6. *Judgment pro confesso.*] Where a defendant to a claim is absconding, and out of the jurisdiction, the Court will not give leave to proceed to have the claim taken *pro confesso*, or to enter an appearance on behalf of the defendant. *Smith v. Corles*, 126.
See AMENDMENTS, 1, 2. COSTS. RECEIVER, 1. WINDING-UP ACTS, 7.

PRINCIPAL AND SURETY.

Rights of Sureties.] A principal and sureties joined in a mortgage of land and bonds, containing powers of sale, and a proviso, that, as between the principal and sureties, the principal and land should be primarily liable. The principal afterwards mortgaged the land and bonds to the mortgagee for a further advance:—

Held, that the sureties were entitled to redeem the land and bonds on payment of the sum secured by the first mortgage. *Bowker v. Bull*, 126.

PRIVILEGED COMMUNICATIONS.

1. *Solicitor.*] A husband and wife being desirous of releasing an estate from the wife's jointure, a solicitor is employed and a deed executed, the wife having no other legal adviser in the matter. A suit being instituted, the husband and solicitor each state, in their answer, that the solicitor acted for the husband. Production of certain cases prepared, and opinions taken by the solicitor, refused. *Warde v. Warde*, 94.
2. *Defendant's Wife.*] The defendant, J. Taylor, was entitled to an annuity under a will, subject to a proviso, that if he attempted to charge or dispose of such annuity, it should be applied by the executors for the benefit of the said J. Taylor or his wife, or such other persons mentioned in the will as the executors should think fit. A writ of sequestration having issued against J. Taylor, he assigned his annuity to a trustee for the benefit of his wife. The sequestrators filed this bill to set aside the assignment, alleging, that it was a fraudulent arrangement to defeat their claims. The wife of the defendant, J. Taylor, by her answer, stated that the object of the assignment by J. Taylor was to effect a forfeiture of the annuity, in the expectation that the executors of the testator would apply it, or some portion of it, for the benefit of his wife, and at the same time to defeat the claims of the plaintiffs. She submitted that she was not bound to produce the documents and communications which passed between her and her solicitor relative to the assignment. The answer was excepted to for insufficiency:—
Held, that there was no fraud in this transaction; that it was one as to which it was perfectly lawful for a client to ask, and for a solicitor to give, professional advice, and the documents relating to it were within the admitted rule of privilege. *Follett v. Jefferys*, 172.
3. *Sufficiency of Answer.*] The answer stated that the defendant had documents, but that they had been procured since the institution of this suit, and with a view to the defence, and that the same were, as defendant was advised, confidential communications, and for that reason the defendant refused to set forth any list of or to produce such documents:—
Held insufficient. *Balguy v. Broadhurst*, 188.

PRODUCTION OF PAPERS.

See PRIVILEGED COMMUNICATIONS.

PUBLICATION.

See COPYRIGHT.

RAILWAY COMPANY'S ACTS.

1. *Construction of.]* The L. & B. Railway Company, under their act, (1833,) purchased land of Eton College, and in May, 1846, paid the purchase money into court. That act authorized the intermediate investment of such money in the funds, but was silent as to the costs of such investment. By the 8 & 9 Vict. c. 204, the L. & B. Railway Company, and certain other companies, were consolidated and incorporated together under the style of the L. & N. W. Railway Company. By the first section, the existing acts of the several companies were repealed, and the companies dissolved; with a proviso that such repeal should not annul any purchase, &c., made thereunder; and by section 10, where any sum of money had been paid into the Bank on account of the purchase of land by any of the dissolved companies, the same was to be disposed of pursuant to the act under which it had been paid in; and all the provisions of the repealed act, in relation thereto, were, for the purposes of this act, to remain in full force, &c.; and by section 11, the Lands Clauses Consolidation Act, 1845, was incorporated with this act. The 80th section of the Lands Clauses Consolidation Act, 1845, provided, that in the case of moneys paid into the Bank, under that or the special act, (the word "special" being interpreted by sect. 2 as an act to be afterwards passed,) the costs of and incident to an intermediate investment in the funds should be borne by the company. Upon the petition of Eton College in 1849 for an investment of the purchase money in the funds, it was held, that the L. & N. W. Railway Company were liable to pay to the petitioners the costs of such intermediate investment in the terms of the 80th section of the Lands Clauses Consolidation Act, 1845. *Eton College*, ex parte, 51.
2. Where the words of a railway company's act are capable of two interpretations, but the general intent of the legislature is complete indemnification to the party whose land is taken by the company, the Court will incline to that construction of the words which will make them consistent with the general intent. *Id.*

RAILWAY COMPANY.

See WINDING-UP ACTS. Costs, 4.

RECEIVER.

1. *When ordered.]* On a common claim, a receiver ordered at the hearing. *Bickford v. Chalker*, 113.
2. *Profits of a Living.]* Where a creditor has obtained a judgment against an incumbent, the Court can, on a case for a receiver being made, appoint a receiver of the profits of the living. *Hawkins v. Gathercole*, 135.

See SHERIFF.

REDEMPTION.

See PRINCIPAL AND SURETY.

REGISTRATION, WHEN COMPLETE.

See WINDING-UP ACTS, 11.

SALARY.

See WINDING-UP ACTS, 10.

SEQUESTRATION.

See CONTUMACY.

SHAREHOLDERS.

Liability of.]

See WINDING-UP ACTS.

SHERIFF.

Contempt of Court.] A railway company, being greatly indebted to bond and simple contract creditors, made an arrangement with the majority, but to which some refused to accede, and one creditor by simple contract obtained a judgment. On a bill filed by a bond creditor against the company and other persons representing several classes of creditors, a receiver and manager of the company's effects was appointed by consent and put into possession, and a few days after the sheriff levied on behalf of the judgment creditor. On motion to commit the sheriff for contempt in disturbing the receiver, he justified his levy on the ground that the appointment of the receiver had been collusive, and intended to defeat the judgment:—

Held, that the Court was bound to justify its authority, without reference to the propriety or otherwise of the order for a receiver, and to protect its own officer, and the sheriff was ordered to withdraw from possession and levy the costs of the motion. The order was made to be without prejudice to any application by the execution he might make, to be heard *pro interesse suo*. *Russell v. The East Anglian Railway Company*, 101.

SOLICITOR AND CLIENT.

See PRIVILEGED COMMUNICATIONS.

STATUTES CITED AND EXPOUNDED, &c.

53 Geo. 3, c. 127.	Limitations,.....	181
2 & 3 Will. 4, c. 93.	Contumacy, Sequestration,.....	201
3 & 4 Will. 4, c. 36.	London and Birmingham R. Co.,.....	51
3 & 4 Will. 4, c. 104.	Assets,.....	203
1 & 2 Vict. c. 110.	Deeds,.....	90
2 Vict. c. 11.	Registered Judgments,.....	143, 158
7 & 8 Vict. c. 110, s. 72.	Deeds,.....	90
13 & 14 Vict. c. 60.	Trustee Act,.....	199, 200, 226

SURETY.

See PRINCIPAL AND SURETY.

TITHES.

See RECEIVER, 2. ARBITRATION AND AWARD.

TRUST.

1. The plaintiff being entitled to a legacy under a will, filed a bill against the executor for payment, and obtained a decree for the amount due. The executor had previously conveyed his property to trustees for the benefit of his creditors. The plaintiff, who was no party to that arrangement, not being able to obtain payment under the decree, issued writs of *elegit* and sequestration against the property of the executor, and then filed this bill against the executor and the trustees of the creditors' deed, praying that the deed might be declared a voluntary deed of agency, and that the trustees might be restrained from setting it up against the writs of *elegit* and sequestration, and that the plaintiff might be declared entitled, upon the expiration of a year from the first decree being registered, to an equitable charge for the amount decreed to be paid:—

Held, that the creditors' deed effectually created a trust for the benefit of the creditors, which they had a right to insist upon being performed: and that it was not a mere deed of agency, and was irrevocable as against the creditors. *Mackinnon v. Stewart*, 158.

2. *Dividends.*] Party entitled to a life interest in a fund paid into Court under the above act allowed to apply for the payment of the dividends to him *in forma pauperis*. *Money*, in re, 188.

TRUSTEE PROCESS.

See FOREIGN ATTACHMENT.

TRUSTEES.

1. *New Trustees.*] When a trustee retires, and new trustees are appointed by the Court, the retiring trustee is entitled to have the accounts taken. *Nott v. Foster*, 125.

2. *New Trustees — Transfer of Stock.*] New trustees are persons absolutely entitled to stock in the funds, within the trustee act, 1850, and may apply to the former trustee for a transfer. On his refusal, the Court will appoint a person to transfer in his place. Difficulty of obtaining a transfer of stock under that act. *Russell's Trust*, 225.

See LUNATIC.

WIFE.

See PRIVILEGED COMMUNICATIONS, 1.

WILL.

1. *Legal Condition.*] A testator, by a codicil to his will, declared that in case his daughter should carry out her intention of taking the veil, becoming a nun, continuing to reside in a convent, or in any other way associating herself permanently with any Roman Catholic establishment of that nature, she should forfeit all claim to, or benefit from, the bequest of 10,000*l.* given her by his will for life, and afterwards to her children; and he thereby, in that case, revoked the said bequest; and in order to prevent any portion of his property from being appropriated to other purposes than the benefit of his family, he excluded his said daughter from all reversionary advantages whatever from his said will. The testator's daughter having associated herself with a convent of nuns at Hammersmith, the trustees of the will paid the 10,000*l.* into Court under the Trustee Act. Upon petition by the daughter, that the said sum might be paid out for her benefit, it was
Held, that the condition imposed was a lawful condition, although the will contained no bequest over, and the legatees had forfeited all claim to the legacy. Petition dismissed. *Dickson*, in re, 149.
2. *Construction.*] A testator gave his estate on trust to assign the same between his eight children, when they should attain the age of twenty-one, and in the mean time to pay to his wife, or otherwise apply the rents and proceeds of the respective shares, for or towards their respective maintenance and education; and there was a direction that, in case of death under twenty-one, the share, with the accumulations, if any, should go to the children who did attain that age:—
Held, that the mother, having maintained the children, was entitled to the rents and proceeds without account. *Brown v. Paull*, 130.
3. *Construction — Next of Kin.*] A testator devised and bequeathed all his real and personal estate to trustees upon trust (after certain life estates) for the heir at law of his family then living, whosoever the same might be:—
Held, that the next of kin of the testator, according to the Statutes of Distribution, had no interest under the above gift. *Tellow v. Ashton*, 164.

WINDING-UP ACTS.

1. *Contributory.*] E. Walstab had taken shares in a company, and had paid the deposit, but had since recovered back the deposit in an action at law against one of the directors:—
Held, that she was not liable as a contributory under the Winding-up Act. *Walstab*, ex parte, 170.
2. *Provisional Committee-man.*] The Master placed Mr. Carmichael on the list of contributories to a company, as a provisional committee-man, and as an allottee of 100 shares:—
Held, that as the evidence was not sufficient to show that Mr. Carmichael had bound himself to take any shares, and that he being only in the position of a provisional committee-man, who had not authorized any expenditure on his behalf, his name must be expunged from the list of contributories. *Carmichael*, ex parte, 66.
3. *Contributory.*] The Master placed on the list of contributories a person who had accepted shares and paid the deposit upon them, but had not belonged to the provisional committee. The company never came actually into existence, owing to the requisite amount of capital not having been paid up. The Master's decision was reversed, upon the ground that persons, by taking shares in such a company, did not render themselves liable for any expenses incurred without their sanction. *Maudslayi*, ex parte, 61.
4. *Contributory.*] The Master had placed the name of Mr. Clarke on the list of con-

- tributories, on the ground that he had allowed his name to be advertised as one of the provisional committee. Mr. Clarke had taken no shares in the company:—
Held, that a person being one of the provisional committee did not of itself subject him to any liabilities, unless he had authorized expenses being incurred on his behalf. The Master's decision was reversed. *Clarke*, ex parte, 69.
5. *Contributory*.] A party took shares in a joint-stock company, paid deposit and calls, but did not execute the deed. He having neglected to pay a call, the directors, in pursuance of a clause in the deed, resolved that his shares were forfeited, and communicated this resolution to him. The company being ordered to be wound up, the Master placed this person's name on the list of contributories; but, upon appeal, it was declared that he was not a contributory. *Baily*, ex parte, 141.
6. *Contributory*.] The directors of a joint-stock company passed a resolution in 1840, to take a number of shares among them, and signed letters agreeing to take them. One of them signed a letter for 100 shares, and on a call being made in the following year, he gave his promissory note for the amount of the call. The deed of settlement contained a power for the directors to buy shares. This party in 1842 retired from the direction, and applied to have the 100 shares taken back, which was agreed to, and his letter of application, and the promissory note, were delivered up to him. An order having been made for winding up the affairs of the company, the Master placed this person's name on the list of contributories in respect to the 100 shares. On appeal, the Court being of opinion that there was no evidence of fraud or unfairness, ordered his name to be taken off. *Cockburn*, ex parte, 139.
7. *Re-summions*.] When the Master has specially excluded the name of any person from the list of contributories in respect of any shares, that person cannot again be summoned before the Master in respect of the same shares. *Best's Case*, 197.
8. *Contributory*.] A provisional committee-man who has accepted shares is a contributory. *Sichel's Case*, 194.
9. *Contributory*.] The managing committee of a company having resolved that each provisional committee-man should be offered 250 shares, A. B., one of that body, was by letter offered that number, which he by letter accepted, but only 100 shares were allotted. He did no other act than write to accept the original offer:—
Held, that although the Court assumed he had received a second letter, stating that the remaining 150 shares would be allotted if the committee of management were able to effect it, he was not a contributory. *In re Barber*, 190.
10. *Salary of Officers*.] When an insurance company was formed, it was resolved that no director of the company should be personally responsible for the salaries of the officers, and that no officer should obtain payment for his services until a sufficient sum should have been obtained by the funds of the company for that purpose. It was also agreed that the officers should receive half their salaries until such time as it might be convenient to the company to pay the whole. Upon the company being wound up, the Master disallowed the claim of the secretary for salary during the two years he had acted as such, and one year afterwards for default of notice:—
Held, that the claim for the full amount of salary for two years only must be allowed. *Cope*, ex parte, 87.
11. *Registration*.] The Master, upon winding up the Independent Assurance Company, excluded certain shareholders from the list of contributories, on the ground that the requisitions of the statute 7 & 8 Vict. c. 110, in regard to the deed of incorporation, had not been complied with before the certificate of complete registration was obtained:—
Held, that the certificate of the registrar was sufficient evidence of complete registration, although all the requisite provisions might not have been fully complied with. *Bird*, ex parte, 90.

See COMMON LAW INDEX, WINDING-UP ACTS.

Common Law, Admiralty, &c.

☐ In this index the cases in the Ecclesiastical and Admiralty Courts are denoted by the abbreviations (EC.) and (AD.) All other cases are in the Common Law Courts.

ACTION.

1. *Against an Officer.*] A messenger of the Court of Bankruptcy, who takes the goods of a stranger, though in the *bona fide* belief that they are the goods of the bankrupt, which, by the warrant of the Court, he is directed to take, is not entitled to the protection of the 12 & 13 Vict. c. 106, s. 107, but is liable to an action of trespass, without there being any demand of the perusal of such warrant. *Munday v. Stubbs*, 392.
2. *Mining — Right to Sub-surface.*] When the surface of land belongs to one man and the minerals belongs to another, no evidence of title appearing to regulate or qualify their rights of enjoyment, the owner of the minerals cannot remove them without leaving support sufficient to maintain the surface in its natural state. The owner of the surface close, while unincumbered by buildings and in its natural state, is entitled to have it supported by the subjacent mineral strata; and if the surface subsides and is injured by the removal of these strata, although the operation of removal may not have been conducted negligently, nor contrary to the custom of the country, the owner of the surface may maintain an action against the owner of the minerals for the damage sustained by the subsidence. *Humphries v. Brogden*, 241.
3. *Replevin against Magistrates.*] An action of replevin may be maintained against magistrates alone who issue a warrant of distress against the goods of a party. *Jones v. Johnson*, 418.

ADMINISTRATION.

1. *Revocation of.*] Administration was granted describing the deceased as a widower; the administration was revoked on its being discovered he had left a widow, who had been before his death, and still was, resident in New Zealand. *In the Goods of Edwards*, (EC.) 623.
2. *Executor de son Tort.*] The act of an executor *de son tort* is good against the true representative of the deceased only where it is lawful, and such an act as the true representative was bound to perform in the due course of administration. *Buckley v. Barber*, 506.
3. *Residuary Legatee.*] Administration granted, although there was a residuary legatee living. *In the Goods of Culler*, (EC.) 628.
4. *Residuary Legatee.*] A residuary legatee has no right to a grant of administration, while the executor of the former executor is living and represents the original testator. *In the Goods of Beer*, (EC.) 631.

AFFIDAVIT.

See PROBABLE CAUSE.

AGREEMENT.

See PLEADING. STAMP.

ALTERATION OF CONTRACT.

When a discharge of a surety. *Bonar v. Macdonald*, 1.

ANNUITY.

See FRAUDULENT GRANT.

APPEAL.

See PRACTICE.

ARBITRATION AND AWARD.

1. *Attorney's Lien on an Award.*] A cause and all matters in difference had been referred to an arbitrator, the costs of the cause to abide the event. The arbitrator found for the defendant, as to the cause, and as to the matters in difference awarded 30*l.* 15*s.* to the plaintiff, to be paid at the same time and place at which the plaintiff was to pay the costs of the action; and the defendant did, at the appointed time and place, pay the sum awarded to the plaintiff's attorneys, minus 180*l.*, the amount of the costs of the action, but refused to pay the residue unless the plaintiff paid the costs of the action.

The plaintiff having become bankrupt after the making of the award, the Court discharged a rule calling upon the defendant to pay the balance of the sum awarded to the plaintiff's attorneys, who had a lien against the plaintiff for more than the amount awarded, for costs incurred by them in the prosecution of the reference. *Dunn v. West*, 325.

Where an arbitrator has awarded a sum to be paid to A, in respect of matters in difference between him and B, and the costs of the action (a smaller sum) to be paid to B at the same time and place, the Court has no jurisdiction to order B to pay the whole sum awarded to A to A's attorney on account of his lien for A's costs. *Ib.*

2. *When Judgment may be rendered upon Award.*] Where the cause and all matters in difference were referred by order of *nisi prius*, and the costs of the cause were to abide the event, and the arbitrator found that there was no other matter in difference than the subject matter of the action, and ordered a verdict to be entered for the plaintiff, the Court refused to allow the plaintiff to sign judgment and tax the costs before the expiration of the term after the award was made, and within which the defendant might move to set the award aside. *Jones v. Ives*, 382.

3. *Appointment of Arbitrator.*] An injury having been done to the premises of B. by the tunnel of a railway company, for which the company refused compensation, B. served them with a notice under the Lands Clauses Act, 8 & 9 Vict. c. 18, dated the 5th of December, requiring them to appoint an arbitrator on their behalf, and stating that it was his *intention* to appoint S. D. M. his arbitrator, and that if within fourteen days after the notice the company failed to appoint an arbitrator for them, he *would* appoint the said S. D. M. to act for both parties. The company having refused to refer the matter to arbitration, B., on the 1st of January following, served them with a notice, which, after reciting that B. had appointed the said S. D. M. his arbitrator, stated that he then appointed the said S. D. M. to act as arbitrator on behalf of both parties. S. D. M. having awarded a sum of money to be paid by the company to B., a rule was obtained by B. for the company to pay the amount, and a cross-rule was obtained by the company to set aside the award on the ground stated in the rule, that the arbitrator had awarded respecting matters over which he had no jurisdiction.

Semble, first, that no valid appointment of an arbitrator to act for B. had been made by him, and that this objection to the award had been sufficiently pointed out by the rule, but the Court under the circumstances discharged both rules. *Bradley v. The London and North-western Railway Company*, 411.

4. *Award de Premissis.*] A cause and all matters in difference between the parties were, by a judge's order after issue joined, referred to an arbitrator, who recited the order of reference, and made his award "of and concerning the premises so referred as aforesaid:"—

Held, that the award was final, although the arbitrator had not in express terms adjudicated upon a matter submitted to him. *Creswick v. Harrison*, 384.

5. *Attachment to enforce Award.*] The plaintiff having obtained a rule calling on the defendant to show cause why he should not pay a sum of money, pursuant to the award, the Court, being of the opinion that it was not a case in which they would have granted an attachment, discharged the rule. *Ib.*

Semble, the 1 & 2 Vict. c. 110, s. 18, was intended to apply to rules made according to the then existing practice of the Courts, and not to introduce a new practice of making rules such as that sought to be made absolute in the present case. *Ib.*

The case of *Gyde v. Boucher*, 5 Dowl. 127, doubted. *Ib.*

ARREST.

Shooting at a Felon by a Constable.] A constable, who was employed to guard a copse from which wood had been stolen, and who for this purpose carried a loaded gun, saw a man come out of the copse carrying some wood; the constable called to him to stop, but instead of doing so the man ran away, whereupon the constable fired and wounded him in the leg. The constable was afterwards indicted for shooting at the man with intent to do grievous bodily harm; and on the trial it was proved that the stealing of the wood by the man who had been wounded amounted to felony:—

Held, that the constable was properly convicted of shooting with intent to do grievous bodily harm, as, at the time he fired, the fact that a felony had been committed was unknown to him. *Regina v. Dadson*, 566.

ARREST OF JUDGMENT.

See EASEMENT.

ASSAULT.

Sexual Connection by Fraud.] Where a medical practitioner had sexual connection with a female patient of the age of fourteen years, who had for some time been receiving medical treatment from him:—

Held, that he was guilty of an assault, the jury having found that she was ignorant of the nature of the defendant's act, and made no resistance, solely from a *bona fide* belief that the defendant was (as he represented) treating her medically, with a view to her cure. *Regina v. Case*, 544.

Semble, that the prisoner might have been indicted for rape. *Id.*

ATTACHMENT.

See ARBITRATION AND AWARD, 5.

ATTORNEY.

Readmission.] It is not necessary for an attorney who has ceased to take out his certificate for a year previous to the passing of the statute 6 & 7 Vict. c. 73, to apply to be readmitted as an attorney, on his desiring to practice again. It is sufficient for him to obtain a rule to renew his certificate. *Howard*, ex parte, 264.

See PRACTICE.

ATTORNEY AND COUNSELLOR.

See SOLICITOR.

AUCTION.

See DISTRESS.

AUTREFOIS ACQUIT.

There can be no plea of *autrefois acquit*, where there is no judgment on the record, in the former trial. *Jervis, C. J., in Regina v. Reid & others*, 595.

BAIL.

See PRACTICE.

BANKRUPT.

See PROBABLE CAUSE.

BAPTISM.

1. *Regeneration.*] A clerk, in his examination previous to institution by the diocesan, stated that he did not hold the doctrine that every infant is absolutely and unconditionally regenerated by the Holy Spirit in and by water baptism duly administered; and the diocesan refused to institute him by reason of his unsoundness in doctrine:—*Held*, that the diocesan was justified in so refusing. *Gorham v. Bishop of Exeter*, (BC.) 601.

2. *Regeneration.*] The doctrines, that baptism is a sacrament generally necessary to

salvation, but that the grace of regeneration does not so necessarily accompany the act of baptism that regeneration invariably takes place after baptism; that baptism is an effectual sign of grace, by which God works invisibly in us, but only in such as worthily receive it, in whom alone it has a wholesome effect; that, without reference to the qualification of the recipient, baptism is not in itself an effectual sign of grace; that infants baptized, and dying before actual sin, are certainly saved, but that in no case is regeneration in baptism unconditional,—are not contrary or repugnant to the doctrine of the Church of England. *Gorham v. Bishop of Exeter*, 19.

BASTARDY.

Liability of a Soldier for Disobeying Order of Maintenance.] A soldier is liable to an indictment for disobeying an order of Justices requiring him to pay for a maintenance of a bastard child, notwithstanding the provisions of the 52d section of the Mutiny Act, such an indictment being “a criminal matter” within the exception in that statute. *Regina v. Ferrall*, 575.

BILL OF EXCHANGE.

1. *Indorsement. — Delivery for a Special Purpose.*] A, being the payee and holder of a bill of exchange, wrote his name upon it, and gave it to B for the purpose of getting it discounted. B never paid A any money in respect of the bill, but kept it until it was overdue, when he delivered it to C without receiving any value for it:—*Held*, that there was no indorsement by A to B.
Quære, whether there was any indorsement by B to C. *Lloyd v. Howard*, 227.
2. *Liability of Acceptor.*] A person who accepts a bill addressed to himself and others is individually liable. *Owen v. Van Uster*, 396.
3. *Acceptance.*] Where a bill was addressed to a mining company, and accepted by the defendant as manager, and it was shown that he and three others had agreed to form the company, and that the mine had been worked on the footing of that argument:—*Held*, that the defendant was individually liable on the bill as a member of the company. *Id.*
4. The case of *Vice v. Lady Anson*, 7 B. & C. 409; s. c. 6 Law J. Rep. K. B. 24, commented upon. *Id.*
5. *Indorsement for special Purpose.*] The drawer of a bill of exchange which had been accepted, wrote his name across the back of the bill, and delivered it to A to get discounted; who, instead thereof, while the bill was running, deposited it with B as security for money advanced to himself, without fraud on the part of B:—*Held*, that this was a valid indorsement of the bill by the drawer to B. *Palmer v. Richards*, 529.

BOND.

See BOTTOMRY.

BOTTOMRY.

- A British ship, upon which a bottomry bond had been taken, payable on the ship's arrival in England, was sold by the master, as unseaworthy, at public auction, and with the consent of the British consul, at Bahia, to a foreigner, who repaired her, changed her name, and sent her to England. There was no evidence of notice of the bond having been given at the sale:—*Held*, that the ship was still subject to the bond. *The Catharine*, (AD.) 679.
- Bond good against Cargo.*] The master of a Swedish ship took up money on bottomry, in Sweden, on the ship, freight, and cargo. The owners of the cargo were British. The sum borrowed amounted to 390*l.* No appearance was given for the owners of the ship, which was sold under decree for a sum less than that due on the bond. No notice was given to the owners of the cargo, but the shipper was applied to, and refused to advance the money. The master made no attempt to tranship the cargo:—*Held*, that the bond was good against the cargo. *The Bonaparte*, (AD.) 641.

BOROUGH RATES.

The council of the borough of Lichfield, before making a borough-rate, made an estimate pursuant to 5 & 6 Will. 4, c. 76, s. 92, in which was included an item of 105*l.* 1*s.* 10*d.* in respect of three years arrears of salary awarded to a former town

clerk as compensation for his discharge. The same party having also recovered against the town council 467*l.* for damages and costs, and threatening execution against the corporation, received payment for that amount from the attorney for the council, who intended to charge it to the council as a disbursement, but had not delivered his bill of costs. In respect of the sum of 467*l.* and the attorney's bill of costs, the sum of 800*l.* was introduced into the estimate. The council afterwards made a borough-rate, including the above sums.

At a meeting, which was *not public*, the borough council made an order which directed the overseers of certain parishes within the borough to pay the proportions assessed upon their parishes out of the poor-rates *made and collected*; and they also issued a warrant to their treasurer, commanding him within 100 days *from the date thereof* to demand from the overseers the said proportions. The treasurer made his precept to the overseers, requiring them within 100 days *after the receipt thereof* to pay the proportions out of the poor-rates made and collected *or to be made and collected*. The plaintiff, an overseer, not having paid the proportions assessed on his parish, a warrant was issued by the defendants, being the mayor and justices of Lichfield, commencing thus: "*Borough and city of Lichfield.*" The warrant then directed certain parties to levy the sum of 77*l.* 16*s.* 1*d.* by distress of the plaintiff's goods, and provided that "if within the space of five days next after such distress by you taken the sum of 77*l.* 16*s.* 1*d.* shall not be paid, that *then* you do sell the said goods." "Given under our hand and seal, and under the corporate seal of the said borough city. T. T. (L. s.) M. B. M. (L. s.) justices of the said borough and city. (Corporation seal.) *Thomas Johnson, Mayor.*" The defendant, Johnson, was not stated in the body of the warrant to be mayor of the borough:—

Held, first, that a borough-rate need not be made in public. Secondly, that as the rate was good upon the face of it, even although it might be retrospective in fact, (which, *semble*, it was not,) no advantage could be taken of that circumstance as against the defendants. Thirdly, that the warrant was not bad by reason of its directing the sum to be paid out of the rates *to be made and collected*; nor, fourthly, in directing the overseers to pay the sum within 100 days after the receipt of the warrant. Fifthly, that it sufficiently appeared from the warrant, that one of the defendants was mayor of the borough at the time of making the warrant. Sixthly, that the warrant of distress appeared to have been made within the jurisdiction of the mayor and justices. And, lastly, that the warrant was not bad, under the 27 Geo. 2, c. 20, in not fixing the time at which the sale of the plaintiff's goods was to terminate. *Jones v. Johnson*, 418.

CASE.

See EASEMENT.

CASES DOUBTED, APPROVED, &c.

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CAUTIONERS.

See SURETIES.

CERTIFICATE.

See COSTS.

CERTIORARI.

See PRACTICE.

CHURCH OF ENGLAND—DOCTRINES OF.

See BAPTISM.

COLLISION.

1. *Pilot — Interference of Master and Crew.*] A ship under sail, and in charge of a licensed pilot, in running through the Downs on a dark night, came into collision with a ship at anchor:—
Held, first, that where a pilot is taken on board, it is his duty, and not that of the master, to determine where, and whether or not, the ship shall be brought up. *The Lochlibo*, (AD.) 651.
2. *Secondly*, interference, as distinguished from suggestion, is the doing that which the pilot alone ought to have done. *Ib.*
3. *Thirdly*, a hail from any of the crew on the look-out to alter the helm, if such advice be adopted by the pilot as a proper measure in his own judgment, will exonerate the owners; otherwise if the advice be adopted by the pilot unthinkingly, and on the mere report of the look-out. *Ib.*
4. *Rule of Navigation — Pleading.*] The general rule of navigation, where two vessels are close-hauled and nearing one another, is, that the one on the port tack should give way, and the one on the starboard tack keep her luff; but this rule will not excuse the vessel on the starboard tack not taking other measures to prevent a collision, if circumstances render them necessary. *The Lady Anne*, (AD.) 670.
5. The pleadings should state the cause of the collision as accurately and distinctly as possible, leaving nothing to inference. *Ib.*

See FREIGHT.

COMPANY.

See PRACTICE.

CONFESSIONS.

See EVIDENCE.

CONSIDERATION.

See GUARANTY. MARRIAGE.

CONSPIRACY.

Attempt to seduce a Female.] The prisoners induced the prosecutrix, a girl of fifteen years of age, who had left her place as a servant, to go to their house, one of them pretending that she had known the deceased parents of the prosecutrix, and saying that she would keep her until she got a place, and that they both would assist her in getting one. The prisoners were women of bad character, and the place where they resided was a house of ill fame. It was false that they or either of them had known the parents of the prosecutrix, and they took no step whatever to get her a place, but urged her to have recourse to prostitution. They introduced a man to her, and attempted, by persuasion, and holding out prospects of money, to induce her to consent to illicit connection with him. The prosecutrix refused to consent, and declared her intention of quitting the house; the prisoners refused to give her her clothes, and she left without them:—
Held, that the prisoners were rightly convicted of a conspiracy under stat. 12 & 13 Vict. c. 76; and that they might have been indicted for the offence at common law. *Regina v. Mears and Chalk*, 581.

CONSTRUCTION.

See DEVISE. CONTRACT. GUARANTY.

CONTEMPT.

See THE BURE, (AD.) 674.

CONTRACT.

1. *Construction of.*] The first count of the declaration averred that the plaintiffs C. and S., being tenants to H. of certain chambers, at a certain rent, payable quarterly, underlet them to the defendant, who undertook to pay the said rent to H., and agreed that if he did not do so, he would indemnify the plaintiffs in respect thereof, and that the defendant did not pay the rent to H., nor indemnify the plaintiffs:—

Held, that whether the contract meant that the defendant was to pay to H. the rent due from the plaintiffs to H., or to pay the rent under the demise from the plaintiffs, the promise of the defendant to pay did not extend beyond the term of his own tenancy. *Smith v. Lovell*, 374.

2. *Construction of.*] The defendant being the owner of a ship, inserted the following advertisement in the *Shipping Gazette*: "The fine teak-built bark *Intrepid*, A 1, 286½ tons register, built under particular inspection at Coringa, in 1842, of the best material, shifts without ballast, carries a good cargo, has a poop, and excellent height between decks, and is well adapted for a passenger ship; length 91 5-10 feet, breadth 22 feet 8 inches, depth 16 feet 8 inches; now lying at the St. Katharine Docks. For inventories and further particulars apply to J. H. Arnold, 3 Clement's Lane, Lombard Street."

The plaintiff having seen the ship, entered into a written agreement to buy her, "as she now lays in the St. Katharine Docks, agreeably to the inventory annexed." This document commenced thus: "For sale by private contract the fine teak-built bark, *Intrepid*," &c., pursuing the terms of the advertisement down to the words "St. Katharine Docks." Then followed this statement: "Hull, masts, standing and running rigging, with all faults as they now lie." Under this was the word "inventory," which was followed by a list of the ship's stores and tackle; and the document concluded with these words: "The vessel and her stores to be taken with all faults as they now lie, without any allowance for deficiency in length, height, quantity, quality, or any other defect or error whatever. For inventories and further particulars apply to J. H. Arnold, 3 Clement's Lane, Lombard Street, London."

The defendant signed his name to this inventory, opposite to the list of the ship's stores. The vessel proved not to be teak-built, nor of class A 1, nor adapted for a passenger ship:—

Held, that the contract of sale incorporated the whole of the above document, and not merely the list of stores headed "inventory." *Taylor v. Bullen*, 472.

3. *Condition precedent.*] A building contract between A and B contained a proviso that the payments thereby agreed to be made by B should only be due provided the certificate of the surveyor of B, for the time being, should first be obtained. A having sued in *indebitatus assumpsit* for the balance alleged to be due:—

Held, that under the general issue, the absence of the certificate was a good answer to the action, and that the plaintiff was not at liberty to show that it was withheld fraudulently and in collusion with the defendant. *Milner v. Field*, 531.

See MARRIAGE.

COPYRIGHT.

See PATENT.

COSTS.

1. *Set off of Costs.*] The rule of Hil. 2 Will. 4, s. 93, only applies to cases in which the Court has a discretion to allow costs or damages of different actions to be set off against each other, and where there has been an application to allow such set-off. *Dunn v. West*, 325.

2. *Upon Issue found for Plaintiff.*] To a declaration in assumpsit the defendant pleaded sixteen pleas; the plaintiff took issue on fifteen, and demurred to the sixteenth, which went to the whole cause of action. The fifteen issues were tried, and found for the plaintiff; but judgment was afterwards given for the defendant on the demurrer:—

Held, that the plaintiff was entitled, under the 4 Ann. c. 16, s. 5, to the costs of those issues; overruling *Partridge v. Gardner*, and *Howell v. Rodbard*, 4 Exch. R. 303, 309; affirming *Bird v. Higginson*, 5 Ad. & El. 83; and *Clarke v. Allatt*, 4 Com. B. R. 335. *Callander v. Howard*, 388.

3. *Certificate — When to be granted.*] A certificate to deprive the plaintiff of costs under the 43 Eliz. c. 8, s. 2, is inoperative if granted after final judgment, and it makes no difference that at the time of granting the certificate the amount of costs has not been inserted in the judgment book. *Lyons v. Hyman*, 407.
4. *Adjudication upon Affidavits.*] Where the defendant's affidavits, on a motion for a suggestion under the County Courts Act to deprive the plaintiff of costs, stated that the residence of the plaintiff was within twenty miles of that of the defendant, and that the cause of action arose wholly within the jurisdiction of the County Court of B., which facts were denied by the affidavit of the plaintiff, the Court refused to determine those questions on affidavits, and directed a suggestion to be entered. *Lewis v. Forsyth*, 464.
5. *Upon Writ of Error.*] If the plaintiff below recovers judgment by default, and the defendant below after payment of the debt and costs sues out a writ of error on which the former judgment is affirmed in the Court of Exchequer chamber, the plaintiff below is not entitled to his costs in error under the stat. 3 Hen. 7, c. 10, as he has not been delayed in the execution of his judgment. *Sutherland v. Mills*, 469.
6. *Certificate for.*] A party who sues in a Superior Court for a sum exceeding 20*l.*, but in consequence of the proof of part payments recovers a verdict for less than that amount, will be deprived of his costs by the County Court Act, 9 & 10 Vict. c. 95, s. 129, unless the Judge by whom the cause is tried certifies that the action was fit to be brought in a Superior Court. *Turner v. Berry*, 501.
7. *Affidavit to deprive Plaintiff of.*] An affidavit for a suggestion to deprive a plaintiff of costs under the County Courts Act, 9 & 10 Vict. c. 95, s. 128, 129, stated that at the time, &c., the plaintiff was residing and carrying on his business at A., within the jurisdiction of the County Court of B., and the defendant was residing and carrying on his business at C., within the jurisdiction of the County Court of D., and that the plaintiff "did not dwell more than twenty miles from the defendant:—"—*Held* insufficient, as not showing that the parties dwelt within twenty miles of each other. *Room v. Cottam*, 504.
- The case of Hayter v. Fish*, 6 Com. B. Rep. 568; 12 Jur. 1004, disapproved. *Ib.*
8. *Affidavit.*] A Judge's order for allowing costs to a plaintiff under the County Court Extension Act, 13 & 14 Vict. c. 61, may be made on a statement of the facts necessary to bring the case within the statute, without affidavit, if that statement is not disputed by the opposite party. *Power v. Jones*, 512.

COUNTERFEITING.

Uttering and putting off.] The prisoner, in payment for some goods at a shop, put down on the counter a counterfeit shilling. The shopman took it up and said that it was bad. The prisoner then quitted the shop, leaving the coin there:—*Held*, that the prisoner had "uttered and put off" the counterfeit shilling within the meaning of the statute. *Regina v. Welch*, 588.

COVENANT.

See LANDLORD AND TENANT.

DAMAGES.

Freight liable for.] The whole of the freight, without any deductions, due, or to grow due, for and during the voyage which may be in prosecution or contracted for at the time of the happening of loss or damage by collision, is liable to answer for or make good such loss or damage. *The Benares*, (Ad.) 637.

DELIVERY FOR A SPECIAL PURPOSE.

See BILL OF EXCHANGE.

DERELICT.

See SALVAGE.

DESCRIPTION.

See CONTRACT. WARRANTY.

DEVISE.

Construction.] Words of description following a general devise will not be construed as restrictive, where the effect of doing so would be to render the general devise inoperative, and where they may be rejected as a false demonstration. *Doe d. Campton v. Carpenter*, 307.

DISTRESS.

1. *When Goods are not liable to.*] Goods sent to an auctioneer to be sold in a room hired by him from one who has no authority to let it, are privileged from distress while they are in that room for the purpose of being sold by auction. *Brown v. Strudel*, 373.
2. The fact of such room never having been used as an auction room before, and only being hired for the occasion, is immaterial as regards the privilege of the goods from distress. *Ib.*

DOWER.

1. *Damages for withholding.*] On a plea of *tout temps priet* to a declaration in dower under the statute of Merton, replication of a demand and refusal to render dower before the writ sued out, rejoinder traversing the demand, and issue thereon found for the demandant, the demandant is entitled to damages from the death of her husband, and not from the date of the demand only. *Watson and Watson*, 371.
2. *Demand of.*] Dower may be demanded by another person on behalf of the widow; and a demand in the presence of witnesses is not necessary. *Ib.*

EASEMENT.

1. *Mining — Right to Sub-surface.*] When the surface of land belongs to one man, and the minerals belong to another, no evidence of title appearing to regulate or qualify their rights of enjoyment, the owner of the minerals cannot remove them without leaving support sufficient to maintain the surface in its natural state. The owner of the surface close, while unincumbered by buildings and in its natural state, is entitled to have it supported by the subjacent mineral strata; and if the surface subsides and is injured by the removal of these strata, although the operation of removal may not have been conducted negligently nor contrary to the custom of the country, the owner of the surface may maintain an action against the owner of the minerals for the damage sustained by the subsidence. *Humphries v. Brogden*, 241.
2. *Right to Support of surrounding Soil.*] A declaration in case by reversioners stated that certain buildings and closes of land were in the occupation of A and B, as tenants to the plaintiffs, the reversion belonging to them. That the defendant so negligently, and without leaving proper support, worked certain mines near and contiguous to the said premises, and dug minerals out of the mines near and contiguous to the said buildings and closes, whereby large portions of the buildings became injured, and the ground on which the building stood and the said closes swagged and gave way:—
Held, on motion in arrest of judgment, that the declaration was good: that, as it did not appear that the soil in which the mines were belonged to the defendant, or that the defendant had all the right to get the mines that the owner of the adjoining soil had, the defendant was *prima facie* a wrong doer, and that it was unnecessary to aver in the declaration that the plaintiffs had a right to have the buildings supported by the soil under which the defendant worked. *Jeffries v. Williams*, 434.

EJECTMENT.

See LANDLORD AND TENANT; CHANCERY INDEX, EJECTMENT.

EMBEZZLEMENT.

- From Master by Servant.*] The prisoner, having been entrusted by his master with a number of articles of soldiers' clothing, for the purpose of selling them, and ten pounds in silver, to enable him to give change, sailed in a ship for the coast of Africa, having, before his departure, written to his master to say that he would send the account, together with a remittance, from Madeira:—
Held, that on these facts he could not be convicted of embezzlement, having received the goods from his master himself, and not from another for and on account of his master; but that he might have been convicted of larceny. *Regina v. Hawkins*, 547.

ESTOPPEL.

1. *Officers' Return.*] The sheriff returned to a writ of *fi. fa.* against W., that before the delivery thereof to him another writ of *fi. fa.* against W. was delivered to him, and that by virtue thereof he seized the goods of W. In case against the sheriff for a false return:—

Held, that the sheriff was not estopped by his return from showing that the goods seized under the first writ were not the goods of W. *Remmett v. Lawrence*, 260.

2. *Surety Bond.*] The defendants, as sureties for one J. L., executed, on the 6th October, 1846, a bond to the plaintiffs, who were Commissioners under the Income-tax Acts, which bond recited that J. L. had been duly appointed collector of the duties granted by those acts assessed within the parish of M., and that duplicates of the assessments had been delivered to J. L., with a warrant for collecting the same:—

Held, that the defendants were not estopped by the recital in the bond from denying that J. L. was authorized to collect such duties. *Kepp v. Wiggett*, 365.

See FRAUD, 1.

EVIDENCE.

1. *Parol Evidence to explain.*] Evidence of the circumstances of the parties, at the time a written instrument is given, is admissible to explain its meaning. *Bainbridge v. Wade*, 236.

2. *Stamp—Agreement.*] A declaration alleged, in substance, that the defendant obtained S. D. as a partner for the plaintiff in his business, upon the terms, amongst others, stated in the declaration; that the plaintiff afterwards paid to the defendant 25*l.* for obtaining the said partner, and it was then agreed between the plaintiff and the defendant, that the plaintiff should accept and deliver to the defendant a bill of exchange for 27*l.* 10*s.* payable in eighteen months, upon condition that S. D. should accept the partnership beyond two years, but if S. D., at the expiration of eighteen months, should give notice of his wish to retire from the partnership, and not rescind it, the said bill should be null and void; that in consideration of the plaintiff's delivering the said bill, accepted, to the defendant upon the said condition, the defendant promised, if he should negotiate it, and the said notice were given, and not rescinded, to indemnify the plaintiff from the payment of the said bill and all costs, &c.; that the defendant afterwards negotiated the bill; that the plaintiff had been compelled to pay the amount; that S. D. gave notice, at the end of eighteen months, of his wish to retire from the partnership, and did not rescind the same. Breach, that the defendant had not indemnified the plaintiff from the payment of the said bill.

The defendant pleaded *non assumpsit*, and a traverse of the condition upon which the bill was given; and at the trial, the following unstamped document, signed by the defendant, was admitted, as part of the evidence on behalf of the plaintiff:—

“Mem.—I have this day received of Mr. Fenwick de Porquet a bill for 27*l.* 10*s.* at eighteen months' date, on condition that Mr. Samuel Douglas accepts the partnership beyond two years; but should Mr. Douglas give notice at the expiration of eighteen months, (the bill to be null and void,) and not afterwards rescind the same:”—

Held, that the document had been properly received in evidence without an agreement stamp. *De Porquet v. Page*, 265.

3. *Proof of Partnership.*] It is sufficient evidence to prove a person to be a member of a trading company, that he and others had agreed to form a company, and that business had been carried on upon the footing of the agreement. *Owen v. Van Uster*, 396.

4. *Proof of Register.*] The register of shareholders of a company within the Companies Clauses Consolidation Act, authenticated by its seal, is admissible in evidence without any proof that such seal was affixed at an ordinary meeting of the company pursuant to the 9th section. *The North-western Railway Company v. M^r Michael*, 414.

5. *Impeachment of Witness.*] Where a witness proves facts in a cause which makes against the party who produces him, and an account of the transaction which he had given the proctor before his production is entirely different from that sworn to by him on his examination, the party producing him may produce fresh witnesses to prove the original facts, but cannot plead in exception to his own witness, nor plead the account he had given of the transaction. *The Lochibo*, (A.D.) 645.

6. *Confessions of Prisoner.*] The second caution in the 18th section of 11 & 12 Vict.

- c. 42, is only necessary where some previous inducement or threat has been held out. *Regina v. Sansome*, 540.
- There is nothing in the statute to exclude a confession which would have been admissible at common law. *Ib.*
- If the prisoner's statement be returned purporting to be signed by the magistrate, and bearing on the face of it the first caution, it is admissible without any other evidence. *Ib.*

EXECUTOR DE SON TORT.

See ADMINISTRATION, 2.

FALSE DEMONSTRATION.

See DEVISE.

FALSE IMPRISONMENT.

See PRACTICE.

FALSE PRETENCES.

1. *Begging Letters.*] A begging letter, making false representations as to the condition and character of the writer, by means of which money is obtained, is a false pretence within the statute. *Regina v. Jones*, 533.
2. *Venue.*] Where the prisoner, in a begging letter, which contained false pretences, and was addressed to the prosecutor, who resided in Middlesex, requested him to put a letter, containing a post-office order for money, in a post-office in Middlesex, to be forwarded to the prisoner's address in Kent:—
Held, that the venue was rightly laid in Middlesex, as the prisoner, by directing the money order to be sent by post, constituted the postmaster in Middlesex his agent to receive it there for him; and that, consequently, there was a receipt of the money order by the prisoner within the county of Middlesex. *Ib.*
3. *Passing flash Note.*] Passing off a flash note as a Bank of England note on a person unable to read, and obtaining from him in exchange for it five pigs, of the value of 3*l.* 17*s.* 6*d.*, and 1*l.* 2*s.* 6*d.* change, is a false pretence within the statute. *Regina v. Coulson*, 550.
4. *False Claim that Money is due.*] Where the secretary of an Odd Fellows Society falsely pretended to a member of the society that the sum of 13*s.* 9*d.* was due by him to the society for fines incurred by him as a member, by means of which such secretary fraudulently obtained from him that sum of money:—
Held to be a false pretence within the stat. 7 & 8 Geo. 4, c. 29. *Regina v. Woolley*, 537.
5. *Difference from Larceny.*] It was the duty of the prisoner, who was a servant of the prosecutors, in the absence of their chief clerk, to purchase and pay for, on behalf of his masters, any kitchen stuff brought to their premises for sale. On one occasion, he falsely stated to the chief clerk that he had paid 2*s.* 3*d.* for kitchen stuff which he had bought for his masters, and demanded to be paid for it. The clerk on this paid him the 2*s.* 3*d.* out of money which his master had furnished him with to pay for the kitchen stuff. The prisoner applied the money to his own use:—
Held, that as the clerk had delivered the money to the prisoner with the intention of parting with it altogether, the prisoner was not liable to an indictment for stealing the money, but that he might have been indicted for obtaining it by false pretences. *Regina v. Barnes*, 580.
6. *To Partners.*] An indictment charged the prisoner with attempting, by false pretences made to J. B. and others, to defraud the said J. B. and others of certain goods, the property of the said J. B. and others. On the trial, it was proved that the prisoner made the false pretence set forth in the indictment to J. B. only, with the intent to defraud J. B. and others, his partners, of property belonging to their firm:—
Held, that there was no variance between the indictment and proof, as the words "and others," in the allegation that the false pretence was made "to J. B. and others," might be rejected as surplusage. *Regina v. Kealy*, 586.

See LARCENY.

FALSE RETURN.

See SHERIFF.

FIXTURES.

See LANDLORD AND TENANT.

FORFEITURE.

See LANDLORD AND TENANT.

FORGERY.

Warrant and Order for the payment of Money.] The prisoner forged and delivered as genuine to B, who owed money to A, a letter purporting to be written by A, and addressed to B, in which after setting out the amount due from B, A was made to say, "Sir,—I hope you will excuse my sending for such a trifle," &c., "but I am obliged to hunt after every shilling:—"

Held, that the document was a forged "warrant" for the payment of money within the meaning of the stat. 11 Geo. 4, & 1 Will. 4, c. 66, s. 3. *Regina v. Dawson*, 589.

Semble, that it was also a forged "order" for the payment of money. *Ib.*

FRAUD.

1. *Estoppel.*] In an action on a covenant for the payment of an annuity, the defendant, the grantor, is estopped from pleading that the annuity was granted for the fraudulent purpose of multiplying voices. *Phillipotts v. Phillipotts*, 339.

2. *Effect of fraudulent Conveyance.*] The statutes 7 & 8 Will. 3, c. 25, and 10 Anne, c. 23, are to be construed only as effecting the parliamentary law; the 7 & 8 Will. 3, c. 25, invalidated fraudulent conveyances entered into for splitting votes only so far as to prevent the grantee from having a vote, and did not prevent the estate from passing; and the 10 Anne, c. 23, assuming that an estate passed under conveyances, avoided by the statute 7 & 8 Will. 3, c. 25, so far as the right to vote was concerned, made such conveyances free and absolute, notwithstanding secret trusts and conditions of defeasance, only preventing the grantor from voting, under a penalty. *Ib.*

See CONTRACT.

FRAUDULENT GRANT.

Returning Consideration.] The grantor of an annuity, immediately after the execution of the annuity deed, gave back to G., the agent of the grantee, who also acted as his agent in the transaction, a part of the consideration for the purchase of the annuity, in payment of a debt due from himself to G., and also for the expenses in relation to the transaction:—

Held, that there was no return of the consideration money within sect. 6 of stat. 53, Geo. 3, c. 141. *Aberdein v. Jerdan*, 296.

FREIGHT.

Damages, Freight liable for.] The whole of the freight, without any deductions, due, or to grow due, for and during the voyage which may be in prosecution or contracted for at the time of the happening of loss or damage by collision, is liable to answer for or make good such loss or damage. *The Benares*, (AD.) 637

GUARANTY.

Construction—Sufficiency of Consideration.] A declaration in assumpsit, after alleging that A. L. had requested the plaintiff to sell him goods upon credit, and that the plaintiff had agreed to do so, provided the defendant would guaranty the price of the said goods; further stated, that before the said A. L. was indebted to the plaintiff for any goods or chattels, and at a time when no goods delivered by the plaintiff to A. L. on credit remained on credit, and when no money was due to the plaintiff from A. L., the defendant signed the following guaranty: "I hereby guaranty the payment of any sum or sums of money due to you from Mr. Andrew Little, of Richmond, the amount not to exceed at any time the sum of 100*l*." The declaration then alleged the subsequent sale and delivery to A. L. of divers goods and chattels upon credit, to the amount of 100*l*.; and that although the time of credit and for payment had elapsed, and A. L. had not paid the amount when requested, of all which the defendant had notice, yet the defendant had not paid the said amount, &c.:—

Held, upon demurrer, that a future supply of goods sufficiently appeared, from the

terms of the guaranty itself, to be the consideration of the defendant's promise; and that, at all events, supposing the terms of the guaranty to apply equally to a past as to a future consideration, evidence of the circumstances of the parties at the time when the guarantee was made, was admissible to explain its meaning; and that they, as appeared from the declaration, showed that a future consideration was meant. *Bainbridge v. Wade*, 236.

HABEAS CORPUS.

1. *Warrant to discharge Debtor.*] Case against the keeper of the Queen's Prison for not having the body of a debtor before the Exchequer, pursuant to a writ of *habeas corpus ad satisfaciendum*. Plea, not guilty by statute. The defendant had in his custody a debtor, detained at the suit of the plaintiff on a *ca. sa.* from the Palace Court. The debtor subsequently petitioned the Insolvent Court for his discharge under 1 & 2 Vict. c. 110, s. 35. On the 7th of January, the vesting order was made. On the 27th of March the plaintiff sued out a *habeas corpus ad satisfaciendum*, returnable on the 15th of April, to charge the defendant in execution. On the 8th of April the Insolvent Court ordered the debtor to be discharged *forthwith* as to debts due on the 7th of January, excepting a debt due from the plaintiff, and as to that, that he should be discharged as soon as he should have been in custody at the suit of the plaintiff for three months, *to be computed from the time of the vesting order*. The warrant, dated the 9th of April, directed the discharge of the debtor in conformity with the terms of the vesting order, and on that day the prisoner was discharged. The defendant, on the 15th of April, returned to the writ of *habeas* that the debtor was discharged by a warrant of the Insolvent Court:—
Held, first, that the defendant was entitled to give the act and the special matter in evidence under the plea of not guilty by statute, pursuant to the 1 & 2 Vict. c. 110, s. 110. *Harvey v. Hudson*, 428.
2. *Quære* — If the defence was open to the defendant under the plea of not guilty. *Ib.*
3. *Secondly*, that the defendant was bound to discharge the debtor; that he had no power to detain him until the return of the writ, or to take bail for his appearance thereto, or to retake him after his discharge. *Ib.*
4. *Thirdly*, that the warrant was not void, its meaning being that the debtor was to be discharged forthwith. *Ib.*

HIGHWAY.

See INDICTMENT, 1.

HUSBAND AND WIFE.

Criminal Liability of Wife.] A conviction against husband and wife, for jointly receiving stolen goods, cannot be sustained as regards the wife. *Regina v. Matthews*, 549. And if the jury find both guilty, the conviction may be affirmed as to the husband, and reversed as to the wife. *Ib.*

IMPEACHMENT.

See EVIDENCE, 5.

INDICTMENT.

1. *Surplusage.*] An indictment against a parish for non-repair of a highway, alleged "that from the time whereof the memory of man runneth not to the contrary, there was, and yet is, a common and ancient highway," &c., the only other allegation as to time being that part of said highway, situate, &c., "on 1st day of January in the 12th year aforesaid and continually afterwards, until the taking of this inquisition, was, and yet is," out of repair, so that the liege subjects of the Queen could not during the time aforesaid, nor yet can, go, return, pass, &c. Allegation of immemorality was rejected as surplusage, and enough appeared on the indictment as to time to support the liability charged. *Regina v. Turveston*, 317.
2. *Setting out Instrument.*] Where the setting out of an instrument in an indictment can give no information in the Court, it is unnecessary to set it out. *Regina v. Coulson*, 550.
3. *Description.*] A supplied the materials and superintended the building of some houses on his own freehold estate, with the object of letting or selling the houses. He also erected a building, about twenty-four feet square, with slated roof,

wooden sides, and glass windows. This was used as a storehouse for seasoned timber, as a place of deposit for tools, and as a workshop, where timber was worked up into its proper form, and prepared for use. The prisoner wilfully set fire to this building:—

Held, that in the indictment for arson the building was correctly described as a "shed." *Regina v. Amos*, 592.

Semble, per *Patteson*, J., that A carried on the trade of a builder within the meaning of the statutes, and the building might properly be described as a building for carrying on the trade of a builder. *Ib.*

4. *Repugnancy*.] An indictment, in the first count, charged the prisoner with larceny, on which the jury found a verdict of not guilty; in a subsequent count, the prisoner was charged with having received the article "so as aforesaid feloniously stolen," on which the jury found a verdict of guilty:—

Held, that there was no repugnancy, for that, although the word "aforesaid" in a subsequent count virtually incorporates all the necessary averments as to time and place in that count, the words "so as aforesaid feloniously stolen" did not necessarily mean that the article had been stolen by the person named in the first count, but only that it had before then been feloniously stolen by *some person*. *Regina v. Craddock*, 563.

5. *Entering Verdict*.] A verdict of not guilty can be entered on one count, and of guilty on another. *Ib.*

See MARRIAGE, 4.

INDORSEMENT.

See BILL OF EXCHANGE.

INFANCY.

Liability of Infant Shareholders.] In an action under the Companies Clauses Consolidation Act, 8 Vict. c. 16, s. 26, for calls on shares in a railway company, which the defendant has obtained by original agreement with the company, and his name entered into their register of shares as proprietor thereof, it is no answer to plead that the defendant was an infant at the time of the agreement for the shares, and of entering his name on the register, and of making the calls, that he never ratified or confirmed the purchase, and that the bargain was a disadvantageous one to him. *The North-western Railway Company v. M. Michael*. *The Birkenhead, Lancashire, and Cheshire Junction Railway Company v. Pilcher*, 522.

INSANITY.

See WILL, 3.

INTEREST.

1. *Demand not necessary*.] A surety who is indemnified against all loss by his principal, and who is compelled to pay the debt of his principal, is entitled to interest upon the amount so paid, though interest was not expressly mentioned in the contract between them, and though there was not any demand of interest, and though the claim in respect thereof was not made until many years after payment. *Petre v. Duncombe*, 320.

2. *Special Rate of*.] And where the principal had on one occasion allowed the surety interest at the rate of 5*l.* per cent. on the sum thus paid, it was held no misdirection to leave it to the jury to say whether they would not give the surety interest at that rate in respect of all sums paid by him for the principal under the same contract. *Ib.*

JOINT RECEIVING STOLEN GOODS.

See HUSBAND AND WIFE. RECEIVING STOLEN GOODS.

JOINT STOCK COMPANIES.

See WINDING-UP ACTS.

JUDGMENT, ARREST OF.

See ROBBERY.

JURISDICTION, EXCESS OF.

See TRESPASS, 1. JUSTICE OF THE PEACE.

JUSTICE OF THE PEACE.

1. *Jurisdiction.*] By 1 & 2 Vict. c. 14, s. 2, where any person is apprehended under circumstances denoting a derangement of mind and a purpose of committing a crime for which, if committed, he would be liable to be indicted, two justices of the county in which such person is apprehended, on proof that he is insane or a dangerous idiot, may, by an order, cause such person to be conveyed to the county Lunatic Asylum. "and it shall be lawful for the said justices to inquire into and ascertain, by the best legal evidence that can be procured under the circumstances of personal legal disability of such insane person or dangerous idiot, the place of the last legal settlement of such person," and to make an order on the overseers of the parish where they adjudge him to be settled, for the costs of examining and conveying him to the asylum and of his maintenance in the asylum; "and where such place of settlement cannot be ascertained, such order shall be made upon the treasurer of the county, &c., where such person shall have been apprehended:"—

Held, that the jurisdiction of the two justices to inquire into the settlement of the lunatic was not limited to the time of making the order by which he was conveyed to the asylum, but might be exercised at any subsequent time; and that no order could be made on the county for the expenses, until they had inquired into and failed to ascertain the place of settlement. *Regina v. The Clerk of the Peace of the West Riding of Yorkshire*, 271.

2. *When liable in Trespass.*] *Barton v. Bricknell*, 298.

LANDLORD AND TENANT.

Removal of Fixtures.] The mere removal and sale by a tenant, during the term, of fixtures, which he does not immediately replace, but which can be replaced before the end of the term, is not in itself a breach of his covenant to repair and uphold the demised premises, and to deliver up the same at the end of the term, together with all things affixed thereto. *Doe d. Burrell v. Davis*, 403.

LARCENY.

1. *Original taking — Subsequent Appropriation.*] Where the prisoner went away with the prosecutor's wife, and assisted her in placing wearing apparel and other articles in a box; also in removing the box from her husband's house; afterwards, while the prosecutor's wife remained in adultery with him, pledging some of the articles and applying the money to his own purposes:—

Held, that the direction of the Chairman of the Quarter Sessions to the jury,—

First, that if they were of opinion that the prisoner, going away with the prosecutor's wife for the purpose of adulterous intercourse, was engaged jointly with her in taking the goods; or,—

Secondly, that if the prisoner, though not a party to the original taking of the goods, or their removal after the arrival of the adulteress and himself at his house, had appropriated any part of the goods to his own use, he was guilty of the felony, was a proper direction, and that the prisoner was rightly convicted of larceny. *Regina v. Thompson*, 542.

2. *Possession — Special Property.*] Where a cancelled check, the property of an insurance company, had passed from the hands of the messenger, who received it at the bank, to the prisoner, a clerk in the employment of the company, whose duty it was to keep it for the directors:—

Held, first, that as the check, when it came into custody, had arrived at its ultimate destination, it was really in the possession of the directors, who had a special property in the check; and therefore that the prisoner, who had unlawfully abstracted it, was guilty of larceny, not of embezzlement.

Secondly, that where the directors of a company have a special property in checks or other articles, the interest of a shareholder in the company gives him no property in it, and that he may be indicted for stealing property from the directors. *Regina v. Watts*, 558.

See EMBEZZLEMENT. FALSE PRETENCES.

LIEN.

See SEAMEN'S WAGES.

LIMITATIONS, STATUTE OF.

- 1 *When Right of Action accrues.*] Certain salt, which A had contracted to sell to B, having been destroyed, in November, 1831, B demanded its delivery. Negotiations took place as to whether B was entitled to compensation, and continued till 1838, when A finally refused compensation; soon after which B brought his action against A:—

Held, that the action was barred by the lapse of time. *East India Co. v. Paul*, 44.

2. *Part Payment.*] In 1832, A employed B and C, then in partnership as attorneys, to lay out 500*l.* on mortgage. It was invested accordingly on a mortgage to D. D subsequently sold the property, subject to the mortgage, and the purchaser shortly afterwards paid the 500*l.* to C, who, however, did not inform either B, his partner, or A of such receipt, and again lent the purchaser 300*l.*, and continued to receive the interest thereon. The partnership was dissolved in 1838; but both before and after the dissolution, and after the death of A, which took place in 1840, interest was paid as upon a mortgage of 500*l.* to A and his representatives up to 1848 by C. In 1846, the 300*l.* was paid to C, and the mortgage deed was given up by C, but no reconveyance was ever executed. Neither A nor his representatives had any knowledge of these facts until 1848. Entries had been made by C in the partnership books of the receipts and payments, but B had no knowledge of the transaction subsequent to the original advance of the 500*l.*:—

Held, in an action by the executors of A against B and C, that the Statute of Limitations was a bar to the action. *Sims v. Brutton*, 446.

LUNATIC.

See JUSTICE OF THE PEACE.

MANDAMUS.

Local Sanitary Act.] A party rated under Sanitary Act of Liverpool, appealed to Quarter Sessions of borough, on the ground that he was rated at too large a sum. The act provided that the net annual value of the property, in respect of which persons liable were to be rated, was to be ascertained according to the meaning of words "net annual value" in 6 & 7 Will. 4, c. 96, the act to regulate parochial assessment; and that it should, in all cases for purposes of Sanitary Act, "be taken and estimated according to such value as same was or should be rated or assessed in rate or assessment for relief of poor in year preceding." The assessment, in rate appealed against, was made according to poor-rate of preceding year. On appeal, appellant proposed to show that assessment, although according to poor-rate, was too high; but the Recorder decided that, under section 156, he could not go into evidence as to value, and dismissed appeal. The Court refused to grant a *mandamus* to compel the Recorder to hear the appeal, on the ground that the dismissal was not a declining of jurisdiction by him, but a decision on the appeal, and that, therefore, the Court had no power to issue the *mandamus*. The Court also held the decision of the Recorder to be right. *Regina v. Recorder of Liverpool*, 291.

MARRIAGE.

1. *Consideration of Promise.*] In an action for breach of promise of marriage, the declaration alleged, that in consideration that the plaintiff had promised to marry the defendant, the defendant promised to marry her; that the plaintiff continued and still is unmarried, and, until the discovery of the defendant's marriage, was ready and willing to marry him; that after the defendant's promise, the plaintiff discovered that the defendant was and still is married, and that the plaintiff had not at the time of the defendant's promise any notice of the defendant's then marriage:—

Held, on motion in arrest of judgment, that the declaration was good, and that the plaintiff's remaining unmarried was a sufficient consideration for the defendant's promise to marry her. *Millward v. Littlewood*, 409.

2. *Legality of Promise.*] *Dictum*, per *Pollock*, C. B., that a promise by a married man to a woman to marry her after his wife's death is illegal. *Ib.*

3. The case of *Wild v. Harris*, 18 Law J. Rep. (N. S.) C. P. 297, affirmed. *Ib.*

4. *Refusal of a Clergyman to marry Parties.*] Where a man and woman, notice of whose intended marriage had been published at the Board of Guardians, called at the private house of the clergyman of a chapel in the district, at nine o'clock in the evening, and, showing him the superintendent registrar's certificate, requested him

to appoint a time for their marriage, when the clergyman declared he would marry them when they had expressed a desire to be confirmed, and not till then : —

Held, that this was no proper tender of the parties for marriage, nor a legal demand of marriage, and the clergyman was not liable to an indictment for his refusal at such time and place.

The indictment should have shown that the man and woman were parties who might lawfully have been married. *Regina v. James*, 552.

5. *Quere*, Is a clergyman justified in refusing to marry parties who have not received the sacrament, nor have expressed a desire to be confirmed? *Ib.*

MASTER AND SERVANT.

Liability of Principal for Neglect of Sub-contractor.] A railway company entered into a contract with A to construct a branch line; A contracted with B to erect a tubular bridge, parcel of the works. B had a surveyor, C, whom he paid by a salary of 250*l.* a year to attend to his general business; and after obtaining the contract for the bridge, contracted with C to provide the necessary scaffolding, for which he was to receive 40*l.* irrespective of his salary, B to furnish the requisite materials, including lights. One of the poles of the scaffold rested on a highway, and owing to the want of sufficient light to warn the passers-by, D stumbled over the pole and was injured; subsequent to which additional lights were placed on the spot, and B paid for them : —

Held, that B was not liable, and that D's remedy lay against C. *Knight v. Fox and Henderson*, 477.

MESNE PROFITS.

See TRESPASS.

MINING.

See EASEMENT.

MISDIRECTION.

See PRACTICE, 25.

MONEY PAID INTO COURT.

See PRACTICE, 28.

MORTGAGE.

See PRACTICE.

MUNICIPAL CORPORATION.

Costs.] Where a town council, having laid a borough rate, proceeded to enforce its payment, but were threatened with litigation if they persevered, and in consequence directed their town clerk to consult counsel and take measures to insure them against the threat : —

Held, that the costs occasioned thereby were properly chargeable upon the borough fund under 5 & 6 Will. 4, c. 76, s. 92. *Regina v. Prest*, 250.

NAVIGATION, RULE OF.

See COLLISION.

NEGLIGENCE.

See COLLISION.

NEW TRIAL.

1. *Evidence for.*] Where, at a trial in Bengal, the judge received certain documentary evidence, the Supreme Court, on an application for a new trial on the ground of such evidence being improperly received, should consider the importance of the evidence so received. *East India Co. v. Paul*, 44.

2. *Motion for, after Exceptions.*] After bill of exceptions tendered, the party cannot move for new trial upon a point which might have been (but was not) included therein, without abandoning the bill of exceptions. *Adams v. Andrews*, 305.

3. *Seemle*, if the point could not have been included in the bill of exceptions, the motion might have been made concurrently. *Ib.*

See PRACTICE, 4, 5, 25.

NOTICE.

See SETTLEMENT.

NOTICE OF APPEAL.

See PRACTICE, 29.

OFFICER, RIGHT OF TO ARREST.

See ARREST.

ORDER OF QUARTER SESSIONS.

See CERTIORARI.

PARTNERS.

Articles of Peace against a Partner.] Where one partner by violence forces his copartner out of the business premises of the firm, and threatens such copartner with violence and danger to his life if the latter should venture again to enter the premises, and it is necessary for such copartner to enter and use the premises for the purpose of carrying on his ordinary business as partner, the Court will permit the latter to exhibit articles of the peace against the former. *Regina v. Mallinson*, 289.

See FALSE PRETENCES, 6.

PARTNERSHIP.

1. *Proof of Partnership.*] It is sufficient evidence to prove a person to be a member of a trading company, that he and others had agreed to form a company, and that business had been carried on upon the footing of the agreement. *Owen v. Van Uster*, 396.

2. *Acts not in the Scope of Partnership.*] In 1832, A employed B and C, then in partnership as attorneys, to lay out 500*l.* on mortgage. It was invested accordingly on a mortgage to D. D subsequently sold the property, subject to the mortgage, and the purchaser shortly afterwards paid the 500*l.* to C, who, however, did not inform either B, his partner, or A of such receipt, and again lent the purchaser 300*l.*, and continued to receive the interest thereon. The partnership was dissolved in 1838; but both before and after the dissolution, and after the death of A, which took place in 1840, interest was paid as upon a mortgage of 500*l.* to A and his representatives up to 1848 by C. In 1846, the 300*l.* was paid to C, and the mortgage deed was given up by C, but no reconveyance was ever executed. Neither A nor his representatives had any knowledge of these facts until 1848. Entries had been made by C in the partnership books of the receipts and payments, but B had no knowledge of the transaction subsequent to the original advance of the 500*l.* :—

Seemle, that B was not liable for these acts of C, as they were not within the scope of his partnership authority. *Sims v. Brutton*, 446.

3. *Survivorship.*] The rule *jus accrescendi inter Mercatores locum non habet* applies to prevent a right of survivorship in partnership *challels*. *Buckley v. Barber*, 506.

The rule extends to manufacturers, and likewise to trade fixtures. *Ib.*

4. *Disposal of Partnership Property.*] In our law, surviving partners have no *jus disponendi* in the partnership property, so as to enable them to mortgage the share of the deceased partner together with their own, as a security for a debt principally due from the surviving partners, and in part only from the deceased, and in order to enable them to continue their trade. *Ib.*

5. *Rights of Partners.*] And, *quare*, whether surviving partners have power to sell, and give a good legal title to the share belonging to the executors of their deceased partners, even when they sell an order to pay the debts of the deceased and of themselves. *Ib.*

PATENT.

1. *Design—Registration.*] By 6 & 7 Vict. c. 65, a limited copyright is granted for 60 *

- "any new or original design for any article of manufacture having reference to some purpose of utility, so far as such design shall be for the shape or configuration of such article," provided such design is registered.
- A newly-invented brick, the utility of which consisted in its being so shaped that, when several bricks were laid together in building, a series of apertures was left in the wall, by which the air was admitted to circulate, and a saving in the number of bricks required was effected, is a design capable of being registered under the above statute. *Rogers v. Driver*, 269.
2. *Semble*, that where the invention is the subject of a patent, it may still be registered under the Copyright of Designs Act. *Ib.*
3. *Disclaimer.*] A declaration in *sci. fa.* to repeal a patent "for improvements in instruments used for writing and marking, and in the construction of inkstands," contained suggestions, alleging want of novelty and utility in "a certain part" of the said invention; and that the defendant had not properly described the "said" invention, &c. The pleas denied all the suggestions in the declaration.
- Objections were filed with the declaration under the 5 & 6 Will. 4, c. 83, s. 5, specifying (*inter alia*) claim No. 6, in the specification, as objected to for want of novelty and utility.
- After issue joined, the defendant procured to be enrolled a disclaimer under the 5 & 6 Will. 4, c. 83, s. 1, disclaiming (*inter alia*) the claim No. 6.
- The claims not disclaimed were for improvements in pen-holders and pencil-cases, and in the construction of inkstands. Those disclaimed were for pens, and instruments used for marking with a stamp:—
- Held, first*, that such disclaimer, though enrolled subsequently to issue joined, was admissible for the defendant, and to be read as part of the original specification put in by the prosecutor. *Regina v. Mill*, 346.
4. *Secondly*, that it was not necessary to plead the disclaimer *plais darrein continuance*. *Ib.*
5. *Thirdly*, that the objections filed with the declaration under the 5 & 6 Will. 4, c. 83, s. 5, are not part and parcel of the record, so as to be incorporated with the issues, and show that those specific objections are in issue; and that, therefore, it could not be taken that issue had been joined upon the objections which went to the disclaimed parts of the invention, and that those issues must therefore be tried. *Ib.*
6. *Fourthly*, that the disclaimer, being admitted, proved the issues as to a "certain part" of the invention not being new or useful, in favor of the defendant, the prosecutor at the trial having abandoned all objections except to the sixth claim in the specifications, which had been disclaimed. *Ib.*
7. *Fifthly*, that the title of the patent as regarded "instruments used for writing and marking" was satisfied by the inventions for improvements in pen-holders and pencil-cases, which may be described as instruments used for writing and marking with pens and pencils. *Ib.*
8. *Semble*, in actions or suits, not being proceedings by *sci. fa.*, and which were not pending at the time of the enrolment of a disclaimer under the 5 & 6 Will. 4, c. 83, s. 1, the disclaimer is to be deemed and taken to be a part of the patent or specification from the time of the granting of the letters patent, and not from the time of its enrolment only. *Ib.*
9. The decision in *Perry v. Skinner*, 2 M. & W. 471, questioned by the Court; and *quære*, whether it can be reconciled with their construction of sect. 1. *Ib.*

PAUPER.

The cost of maintenance of a pauper, while remaining in a parish under a suspended order of removal, may be recovered against the parish to which he is adjudged to belong, by an order of two justices, under sect. 84, of stat. 4 & 5 Will. 4, c. 76. *In re The Overseers of Chedgrave*, 279.

PEACE, ARTICLES OF.

See PARTNERS.

PILOT.

Where a pilot is taken on board of a vessel, it is his duty, and not that of the master, to determine where, and whether or not, the ship shall be brought up. *The Lochlibo*, (A.D.) 651.

PLEADING.

1. *Declaration — Sufficiency of.*] A declaration alleging that the defendant wrongfully and improperly, and without leaving any proper or sufficient pillars or supports in that behalf, worked certain coal mines under and contiguous to the close of the plaintiff, and dug for and got and moved the coals, minerals, earth, and soil of and in the said mines, and that by reason thereof the soil and surface of the said close sank in, cracked, swagged, and gave way, is sufficient, without an express allegation that the plaintiff was entitled to have his close supported by the subjacent strata. *Humphries v. Brogden*, 241.
2. *Averment of Time.*] See *HIGHWAY*.
3. *Certainty in a Demurrer.*] A declaration against the sheriff for treble damages, under 29 Eliz. c. 4, stated in detail that five several writs of *fi. fa.* against the plaintiff were delivered to the sheriff, setting out the amount of the indorsements, and it was then averred that the sheriff afterwards, under the said several writs respectively, seized the plaintiff's goods to the value of the said writs. It then alleged that the sheriff took for executing the said writs a large sum, to wit, 52*l.* 12*s.* 3*d.*, the same being more than he was entitled to by 35*l.* 18*s.* 6*d.*, contrary to the form of the statute, whereby an action accrued to the plaintiff for 107*l.* 15*s.* 6*d.*, treble the amount of the damages. To this there was a special demurrer, for not setting out with particularity the amounts taken, and in respect of what fees the excess arose, and that it was not averred that the extortion took place within one year before the commencement of the suit.
Semble, that the declaration did not sufficiently show whether there was one or more seizures, but that this objection was not sufficiently taken by the demurrer, and that in other respects the declaration was good. *Berton v. Lawrence*, 454.
4. *Ambiguity.*] By a deed, after reciting the appointment of W. T. as bailiff to the plaintiffs, the sheriff of Middlesex, the defendants, W. T. and his sureties, covenanted to save harmless the plaintiffs from any action brought against them touching or concerning any matter "wherein the said bailiff shall act, or assume to act as bailiff," or "for, or by reason of, any extortion or escape happening by the act or default of the said bailiff." The declaration, after stating an escape, averred that it happened "by the default of the defendant, W. T., and not otherwise, he, the defendant W. T., then being the bailiff of the plaintiffs as such sheriff." The defendants traversed over, and after setting out the deed, pleaded that the default "was not the default of him, the said W. T., as such bailiff of the plaintiffs:"—
Held, that the plea was bad for ambiguity; but,—
Semble, that the declaration would have been bad on special demurrer, for not showing how the escape was the default of W. T. *Cubitt v. Thompson*, 457.
5. *Misjoinder of Counts.*] The third and fourth counts of a declaration set forth certain promises of the defendant for a good consideration, and not connected with any common law duty arising from the relation between the plaintiff and the defendant, and then alleged a breach of duty in the defendant, consisting solely in the neglect to do the acts which he had by such promises agreed to do, the plaintiff having performed his part of the agreement. The last count was in trover:—
Held, on general demurrer, that the declaration was bad for misjoinder. *Courtney v. Earle*, 333.
6. The case of *Boorman v. Brown*, 3 Q. B. Rep. 511; s. c. 11 Law J. Rep. (n. s.) Exch. 437, and 11 Cl. & F. 1, does not decide that the neglect to perform a contract is in every case a breach of duty for which an action of tort will lie. *Ib.*
7. *Surrender — Traverse.*] The first count of the declaration averred that the plaintiffs C. and S., being tenants to H. of certain chambers, at a certain rent, payable quarterly, underlet them to the defendant, who undertook to pay the said rent to H., and agreed that if he did not do so, he would indemnify the plaintiffs in respect thereof; and that the defendant did not pay the rent to H., nor indemnify the plaintiffs:—
Held, that whether the contract meant that the defendant was to pay to H. the rent due from the plaintiffs to H., or to pay the rent under the demise from the plaintiffs, the promise of the defendant to pay did not extend beyond the term of his own tenancy. *Smith v. Corles*, 374.
8. Pleas — *sixth*, surrender by operation of law; *seventh*, that the plaintiff C., on behalf of himself and the plaintiff S., agreed with the defendant that he should give up possession of the chambers, and that he did give up possession before the rent

became payable; *eighth*, that C., with the sanction and authority of his co-plaintiff, evicted the defendant; *eleventh*, (to counts for use and occupation, and on an account stated,) discharge of the defendant under the Insolvent Debtors' Act:—

Held, that these pleas were good. *Ib.*

9. *Inconsistency.*] Replication to the sixth plea, a special traverse, alleging that the defendant quitted possession of his own wrong; and that, according to the terms of an agreement, the plaintiff recovered possession of the chambers, to the intent that they might let them for the benefit of the defendant, and not otherwise, *absque hoc* that they were duly surrendered:—

Held bad, on demurrer, because the inducement was inconsistent with the traverse. *Ib.*

10. *Too large.*] Replication to the seventh plea, traversing the agreement by the plaintiff C. on behalf of himself and S., and his performance of the agreement; and replication to the eighth plea, traversing the eviction by C., with the sanction and authority of S.:—

Held bad, on general demurrer, as both being too large, from putting in issue the fact that C. had authority from B. *Ib.*

11. *Argumentativeness.*] Replication to the eleventh plea, as to the third count, that the cause of action accrued after the order and adjudication in that plea mentioned:—

Held bad, as amounting to an argumentative denial of the allegation in the plea, that the order and adjudication were made after the causes of action accrued. *Ib.*

12. *Immaterial Issue.*] The plaintiff declared on an agreement by which he let to the defendant two rooms in a house, and the defendant promised, besides the rent, to pay the proportion of the rates to be assessed. The declaration averred that rates were assessed, that the plaintiff paid them, and that the proper and reasonable proportion to be paid by the defendant was a certain proportion, to wit, one third part, amounting, to wit, to 50*l.*, of which the defendant had notice and was requested to pay, &c.

A plea to this declaration denying the request to pay was held bad, on demurrer, as raising an immaterial issue. *Hooper v. Woodmer*, 399.

13. *Special Traverse.*] Also, a special traverse, stating that the proper and reasonable proportion was a certain proportion amounting to 12*l.* 10*s.* and no more; *absque hoc* that the proper and reasonable proportion was a certain proportion, to wit, 50*l.*, was held bad on demurrer, for attempting to put in issue the immaterial allegation, that 50*l.* was the amount of the reasonable proportion. *Ib.*

14. *Surplusage.*] An indictment against a parish for non-repair of a highway alleged "that from the time whereof the memory of man runneth not to the contrary, there was, and yet is, a common and ancient highway," &c.; and the only other allegation that it contained as to time was, that a part of the said highway, situate, &c., "on the first day of January, in the 12th year aforesaid, and continually afterwards, until the taking of this inquisition, was, and yet is," out of repair, so that the liege subjects of the Queen could not during the time aforesaid, nor yet can go, return, pass, &c.:—

Held, that the allegation of immemoriality might be rejected as surplusage, and that without it sufficient appeared on the face of the indictment, as to time, to support the liability charged. *Regina v. Turveston*, 317.

15. *Usury.*] Debt by the public officer of a banking copartnership for work and labor, commission, money lent, interest, and on an account stated. Fourth plea, as to 390*l.* 13*s.*, parcel, &c., that it was corruptly agreed between the defendant and the banking copartnership, that they should lend to him from time to time such sums as he should require, by paying certain checks of the defendant, upon the terms that while the said copartnership should forbear to demand payment of the sums so lent, they should charge the defendant partly for interest and partly under the shift and chevasance of commission for their work and labor, more than 5*l.* per cent., to wit, 10*l.* per cent., and that in pursuance of such agreement, the company did lend to the defendant divers sums, and did charge a large sum, partly by way of interest and partly by way of shift and chevasance of commission, and exceeding the rate of 5*l.* per cent. The plea then identified the sum of 390*l.* 13*s.*, parcel, &c. The fifth plea was similar, but addressed only to the commission and interest:—

Held, upon special demurrer, that the usurious agreement was pleaded with sufficient certainty, and that it was sufficient to state enough to make the agreement illegal within the 12 Ann. stat. 2, c. 16, without averring that the contract was prior to the

2 & 3 Vict. c. 37, or that it was within the exception of that act as relating to land.
Derry v. Toll, 440.

See FRAUD. HABEAS CORPUS. WILL, 4. INDICTMENT. COLLISION. PATENT.
EASEMENT. GUARANTY.

POOR LAWS.

See PRACTICE, 29.

POOR RATE.

Under an act, 4 Vict. c. 16, commissioners were appointed for the improvement of H., within certain limits, containing parts of several townships: and the property in all the public wells or springs of medicinal or mineral waters, within the said limits, was vested in the said commissioners, and they were empowered to add to or alter the existing erections over the said springs, and to erect a pump-room over the sulphur water springs. The act also gave them special powers with reference to the maintaining of footways, the obstruction, cleansing, and lighting of the streets, the removal of dirt and rubbish from houses and premises, the preventing of nuisances, the providing a proper market, and further empowered them to make annual rates upon the owners of property within the limits of the act; the money arising therefrom, as also all other moneys received under the act, to be applied entirely in paying off all moneys borrowed on the rates, and defraying the expenses incurred in carrying out the purposes of the act. A pump-room was afterwards built, under the power for that purpose given by the act, which was open to, and used by, the public generally, subject only to a small payment to the commissioners, and certain other regulations imposed by the act:—

Held, that the commissioners were properly rated as occupiers and owners of such pump-room to the relief of the poor of one of the townships in part within the limits of the act, the purposes for which they were appointed not being for the public advantage only. *Regina v. Com. of Harrogate*, 281.

PRACTICE.

1. *Service of Process.*] *Quare*, whether process against a Scotch Railway Company can be served on its secretary in England. *Wilson v. Caledonian Railway Co.*, 415.
2. A company was incorporated by statute for making a railway, part of the line lying in England and part in Scotland: the Act embodying the Companies Clauses Consolidation Acts for both countries. By a subsequent local act another Scotch Railway Company was amalgamated with the company. A party having a claim against the company in respect of certain shares arising out of that amalgamation, commenced an action in England, and served process on the secretary of the company while in London:—

Held, that this service was good. *Ib.*

3. *Service of Rule on Defendant's Clerk.*] A rule *nisi* cannot be made absolute, no cause being shown, on an affidavit which states that service of the rule has been effected on a clerk of the defendant, at the warehouse of the defendant. The old practice of requiring a service at the defendant's dwelling-house must be adhered to. *Medlicott v. Williams*, 305.
 4. *Right to begin.*] A new trial will not be granted because a judge has wrongly ruled at *Nisi Prius* as to which party must begin, unless such ruling did clear and manifest injustice. *Branford v. Freeman*, 444.
 5. The case of *Edwards v. Matthews*, 11 Jurist, 398, affirmed, and the report of the case *Huckman v. Fernie*, in 3 M. & W. 505, corrected. *Ib.*
 6. *Changing Venue.*] One of two defendants may, under ordinary circumstances, change the venue without the consent of the other. *Job v. Butterfield*, 417.
 7. A rule to discharge a rule for changing the venue need not be drawn up on reading the affidavits on which the original rule was obtained. *Ib.*
 8. *Removal of Cause.*] *Semble, per Curiam*, that the jurisdiction given to the Superior Court by the 9 & 10 Vict. c. 95, s. 90, to remove a cause from a County Court, by *certiorari*, is not taken away by the 13 & 14 Vict. c. 61, s. 16; but it was
- Held*, that on applying for a *certiorari* under that statute, all material facts relative to the state of the cause in the Court below should be brought before the Judge, in

- order to enable him to exercise his discretion in granting or refusing the writ. *Parker v. The Great Western Railway Company*, 514.
9. *Quære*, per Martin, B., whether the action for money had and received was maintainable under the circumstances in *Parker v. The Great Western Railway Company*, 7 Man. & G. 253; 8 Jur. 194. *Ib.*
 10. *Removal of Cause.*] The conditions imposed by the 121st section of the County Court Act, 9 & 10 Vict. c. 95, on removing suits in replevin from those Courts by *certiorari*, are to be complied with when the writ is delivered to the Judge in Court. *Mungeam v. Wheatley*, 516.
 11. *Refusal to allow Removal.*] A Judge to whom such a writ was delivered refused to allow it, and proceeded to try the cause, on the ground that notice of the sureties was not given to the clerk of the Court in sufficient time to communicate with the Judge in order to enable him to fix the amount of the security, and the clerk to express his approval of the sufficiency of the sureties before the sitting of the Court at which they were to be taken:—
Held erroneous, as the question of the sufficiency of the sureties could not arise until the Judge had received in court the declaration required by that section, and fixed the amount in which the sureties were to be bound. *Ib.*
 12. *Adjournment for Inquiry.*] *Quære*, if, after such declaration and fixing such amount, time be required to examine into the sufficiency of the sureties, the Judge may adjourn the cause for that purpose. *Ib.*
 13. *Certiorari, when returnable.*] Every *certiorari* issued under this section ought to be made returnable so as to allow a sufficient time for the preliminary inquiries which it directs. *Ib.*
 14. *Receiving Declaration of Attorney.*] The declaration required by that section may be made by the attorney of the party, at least if he is himself unable to attend; and, in receiving that declaration, the duty of the Judge is altogether ministerial. *Ib.*
 15. *Remedy for Disobeying.*] Where the Judge of a County Court, even through mistake of the law, disobeys a *certiorari* under this section, the remedy is by attachment, or perhaps by rule to return the writ. *Ib.*
 16. *Removal of Judgment.*] The judgment of a County Court may be removed into a Superior Court under the 1 & 2 Vict. c. 110, s. 22, although the party against whom it has been obtained has already been examined by the Judge of the County Court, and committed to jail under the 9 & 10 Vict. c. 95, s. 99. *Copeman v. Gladden*, 528.
 17. *Issuing Execution.*] Where a party, who has been duly summoned to answer a plaint in a County Court holden under the 9 & 10 Vict. c. 95, fails to appear, on which the cause is heard in his absence and judgment given against him, and drawn up to pay the plaintiff's demand with costs forthwith, execution may issue immediately, without previous service of the judgment. *Ely v. Moule & Tombs*, 493.
 18. *Execution.*] Under sec. 36 of 8 & 9 Vict. c. 16, the Court will not order execution to issue against a shareholder of a company without a *sci. fa.*, but will only, upon sufficient ground being shown, allow a *sci. fa.* to issue, in order that execution may be obtained against such shareholder to the extent pointed out by that section. A suggestion is not the proper course. *Hitchings v. Kilkenny Railway Co.*, 357.
 19. It is not sufficient, in order to obtain leave for issuing such *sci. fa.*, to show that *f. fis.* have been issued against the effects of the company into two counties, and *nulla bona* returned to them. *Ib.*
 20. The case of *Bartlett v. Penland*, 1 B. & Ad. 704, in part overruled. *Ib.*
 21. *Execution against Shareholder in Joint Stock Company.*] The mode of issuing execution against a shareholder in a joint stock company, under the 8 Vict. c. 16, s. 36, may be by *sci. fa.*: *sed quære*, whether it might not be in some other form. *Devereux v. The Kilkenny and Great Southern and Western Railway Company*, 481.
 22. *How Sci. Fa. should be issued.*] Such *sci. fa.* should state that the party against whom it issues is a shareholder in the company, together with the amount due on his shares; and also that execution has issued against the property of the company, and been found unavailing to satisfy the plaintiff's claim; all which allegations are traversable. *Ib.*
 23. *Commitment.*] An order on a judgment summons, under the 98th and 99th sections of the 9 & 10 Vict. c. 95, by which the Judge of a County Court ordered a party to pay a debt (previously recovered) by instalments, or on default to be committed to

- prison, is bad; because the party is entitled to a summons to show cause against the committal—confirming *Ex parte Kinning*, 4 Com. B. Rep. 507; s. c. 16 Law J. Rep. (N. S.) Q. B. 257. *Abley v. Dale*, 359.
24. *Stay of Proceedings—Frivolous Action.*] An action of debt having been brought in the Superior Court to recover 9*l.* 10*s.*, the defendant pleaded, except as to 8*l.* 14*s.*, never indebted, and as to 8*l.* 14*s.*, a tender and payment of that sum into Court. The jury found a verdict for the plaintiff on the first issue, damages 16*s.*, and for the defendants on the plea of tender. A motion having been made to stay the proceedings on payment of the debt, without costs, on the ground of the action being frivolous, the Court refused the rule. *Nurden v. Fairbanks*, 471.
25. *New Trial for Misdirection.*] A company consisting of a large number of persons subscribing small sums, was formed for the purpose of buying land, erecting dwellings thereon, and allotting the same to the subscribers. The allotment depended upon the result of a ballot.
- In connection with this company there was established a bank for receiving the deposits of small capitalists and working men, upon the security of the property of the company; and as part of the same concern, a bank in which the subscribers of the company might place their savings for purchasing their land from the company.
- The Judge, in an action of libel, having directed the jury that the whole of this scheme was illegal, on the grounds of its being contrary to the Lottery Acts, and also to the Bank Act:—
- Held*, that the scheme being illegal, as being contrary to the Bank Act, there was no misdirection. *O'Connor v. Bradshaw*, 466.
26. *Motion for New Trial after Exceptions.*] After bill of exceptions tendered, the party cannot move for new trial upon a point which might have been (but was not) included therein, without abandoning the bill of exceptions. *Adams v. Andrews*, 305.
- Semble*, if the point could not have been included in the bill of exceptions, the motion might have been made concurrently. *Id.*
27. *Order of Quarter Sessions.*] Enforced by removal into the Court of Queen's Bench under 12 & 13 Vict. c. 45, s. 18, by Judge's order or rule of Court, without a *certiorari*. *Hawker v. Field*, 310.
28. *Money paid into Court.*] Where a defendant is arrested under 1 & 2 Vict. c. 110, and is released on depositing with the sheriff the amount indorsed upon the writ, with 10*l.* for costs, which sums are afterwards paid into Court, the plaintiff is entitled to have the money paid out of Court to him (subject to taxation) if the defendant neglects to pay an additional 10*l.* into Court, pursuant to 7 & 8 Geo. 4, c. 71, s. 2. *Nyssen v. Ruysenaers*, 439.
29. *Appeal, Notice of, signed by Attorney.*] An appeal against an order of removal, signed and given by an attorney on behalf of the appellant parish, is sufficient. *R. v. Middlessex*, 311. s. p. *R. v. Carew*, 304.
30. *Ground of.*] The term "notice of appeal" in section 9 of 11 & 12 Vict. c. 31, which provides that no appeal shall be allowed against an order of removal if notice of such appeal be not given, as required by law, within a certain specified time, does not apply to the statement of the grounds of appeal. *Regina v. Recorder of Derby*, 314.

PRINCIPAL AND AGENT.

See MASTER AND SERVANT.

PRINCIPAL AND SURETY.

See SURETY. INTEREST.

PROBABLE CAUSE.

Affidavit—Set-off.] Where a creditor files an affidavit of debt under the Bankruptcy Consolidation Act, (12 & 13 Vict. c. 106, s. 78,) he is bound to notice, and deduct any sum due to the debtor arising out of the same transaction as that out of which his own debt arises, and to claim for the difference only; and if he omits to do so, he will be held not to have had reasonable or probable cause for making the affidavit in the amount at which it was made. *Marshall v. Sharland*, 231.

Where, therefore, in an action for goods sold and delivered, the plaintiff sought to recover the price of a cargo of coals, the freight of which he was bound to pay to the captain of the vessel before they could be discharged, and the defendant proved

at the trial, as a set-off, payment of the freight, and reduced the verdict for the plaintiff by that amount, it was held, that the plaintiff had not any reasonable or probable cause for making an affidavit of debt in the Bankruptcy Court, for the full price of the coals, without deducting the amount paid by the defendant for freight; and the Court, under 12 & 13 Vict. c. 106, s. 86, ordered that the defendant should have the costs of the suit. *Ib.*

RAILWAY.

See PRACTICE, 21, 22.

RAPE.

See ASSAULT, 2.

REASONABLE CAUSE.

See PROBABLE CAUSE.

RECEIPT.

See STAMP.

REGENERATION.

See BAPTISM.

REGISTER.

See EVIDENCE.

REGISTRATION.

See PATENT.

REGISTRATION OF VOTERS.

1. *Interest of a Mortgagor.*] A mortgagor of freehold premises in possession of the rents and profits is not entitled to be registered as a county voter under 6 & 7 Vict. c. 18, s. 74, unless he receives therefrom 40s. by the year, after deducting money paid annually by him by way of interest on a sum secured by a mortgage which contains no mention of interest, the time for repayment of the principal sum mentioned in such mortgage having expired; such annual payment being in fact a consideration for remaining in possession. *Lee and Hutchinson*, 329.
2. *Construction of Oath.*] Per *Maule, J.* — The true construction of the words "over and above the interest of any money secured by mortgage" in the freeholder's oath, 28 Geo. 3, c. 36, s. 6, is "money secured," not "interest secured." *Ib.*

RECEIVING STOLEN GOODS.

Manual and constructive Possession.] A, B, and C were jointly indicted for stealing and receiving some fowls. It was proved that A, carrying a sack containing stolen fowls, went with B, at past four in the morning, into the house of C's father; that in about ten minutes time A (still carrying the sack) came out at the back door with B, preceded by C with a lighted candle; that C was the only member of the family up in the house; that the three went together into a stable on the same premises; that the police went into the stable after them, and found the sack lying on the floor, and the three men standing round it as if bargaining. The Bench told the jury, that the taking of A and B with the stolen goods by C into the stable over which he had the control, for the purpose of negotiating about the buying of them, he well knowing the goods to have been stolen, was a receiving them within the meaning of the statute. The jury convicted A and B of stealing the fowls, and C of receiving the fowls, knowing them to have been stolen.

Upon a case, stating the above facts, the question asked being whether the conviction of C was proper:—

Held, by a majority of the Judges, (eight to four,) that the conviction was wrong.

The majority were of opinion that C did not receive the fowls, as they all along remained in the manual possession of A and B, and were never under C's control, and it was not the intention of A and B that C should have them, except on the contingency, which never happened, of his completing a bargain for them.

The minority held, that as C coöperated with A and B in the common purpose of carrying the fowls into the stable, he had a joint possession with them, and that as he knew that the fowls were stolen, and assisted in the removing them for the purpose of negotiating about the purchase, he had a possession with a wicked purpose, and therefore might properly be convicted as a receiver. *Regina v. Wiley*, 567.

See HUSBAND AND WIFE.

REPAIR OF HIGHWAY.

See HIGHWAY.

REPLEVIN.

See ACTION. BOROUGH RATE.

REQUEST

See PLEADING.

ROBBERY.

Conviction for Assault.] The prisoners were indicted for robbery, and, at the time of the robbery, beating the prosecutor. The jury found as their verdict, that the prisoners were guilty of assaulting the prosecutor *with intent to rob him*:—

Held, that the finding did not warrant a conviction for the felony of assaulting with intent to rob, as the indictment for robbery with violence did not include a charge of the minor felony of assaulting with intent to rob, although the word “rob” was used in the indictment. *Regina v. Reid*, 595.

Held, also, that the verdict being a finding of a *felonious* assault would not justify a conviction of assault under the statute 7 Will. 4, & 1 Vict. c. 85, s. 11; that consequently there was no proper verdict, and that the judgment must be arrested. *Ib.*

SALVAGE.

1. See *The Active*, (AD.) 644.

2. *Liability of Ship for.*] The crews of two ships, belonging to J. L., gave some assistance to a ship chartered to J. L., who was bound to provide and pay the master and crew of such ships, the cargo on board of which belonged to J. L.:—

Held, in a suit against the ship, that no salvage could be claimed. *The Maria Jane*, (AD.) 658.

3. *Derelict — Misconduct.*] A ship, laden with lead and iron, sunk on the Shipwash sand, and was there left by the master and crew:—

Held, that the ship was not a derelict; that the authority of the owners and underwriters remained; and the first finders, though they recovered part of the property, forfeited their claim to salvage, and became liable to the costs of a suit instituted by them as salvors, by reason of their subsequent misconduct towards, and forcible resistance to, the authority of the owners. *The Barefoot*, (AD.) 661.

SANITARY ACT OF LIVERPOOL.

See MANDAMUS.

SEAMEN'S WAGES.

Lien — Continuous Voyage.] A Prussian ship sailed from Memel on a voyage to England; she afterwards made other voyages, in the last of which the master executed a bottomry bond on the ship, freight, and cargo. The ship was sold in this country at the suit of the bondholder, and the proceeds brought into the registry. The proceeds and the freight were not sufficient to pay the bond, interest, and costs. The mate and crew entered an action for their wages from the time the ship first sailed, claiming, as against the owners of the cargo on the last voyage, a right to be paid out of the proceeds and the freight:—

Held, that as the contract of hiring showed a continuous contract, the wages sued for were a lien upon, and should be paid out of, the proceeds and the freight. *The Louisa Bertha*, (AD.) 665.

SERVICE.

See PRACTICE, 1, 2, 3.

SESSIONS.

See CERTIORARI.

SET-OFF.

See PROBABLE CAUSE.

SETTLEMENT.

Notice of Chargeability.] By sect. 3 of act 1 & 3 Vict. c. 14, an appeal is given to the overseers, &c., of the parish in which the justices shall adjudge any such insane person to be settled, "in like manner and under like restrictions and regulations as against any order of removal," giving reasonable notice to the clerk of the peace of the county, &c., who is to be respondent in such appeal:—

Held, that these provisions come into operation only when an appeal has been commenced; and that, therefore, the keeper of the asylum was a proper person to serve the notice of chargeability and other documents required by the Poor Law Acts to be sent to the overseers of the parish to be affected by the order of adjudication of settlement. *Regina v. The Clerk of the Peace of the West Riding of Yorkshire*, 271.

See JUSTICE OF THE PEACE.

SHERIFF.

The sheriff returned to a writ of *fi. fa.* against W., that before the delivery thereof to him, another writ of *fi. fa.* against W. was delivered to him, and that by virtue thereof he seized the goods of W. In case against the sheriff for a false return:—

Held; First, that the sheriff was not estopped by his return from showing that the goods seized under the first writ were not the goods of W.

Secondly, by Erle, J., that though the judgment on which the first writ issued was fraudulent, the sheriff seized the goods of W. under the first writ, and not under plaintiff's writ.

The decision in *Inray v. Magnay*, 11 M. & W. 267, 7 Jur. 240, doubted. *Remmet v. Lawrence*, 260.

SHIP OWNERS.

When not liable for Collision of Vessels.]

See COLLISION.

SOLICITOR.

1. *Fees — Charges.*] A town clerk was appointed to his office, on the basis of a report which fixed his salary at 250*l.* a year, and defined his duties to be (*inter alia*) "to prepare all precepts, orders, and other documents required for laying borough rates, to abide by and see that all orders of the council are properly carried out, and all necessary documents prepared for so doing, and to act as the professional adviser of the mayor and council in the business of the council;" and it also provided, "that he be paid the usual professional charges for conducting or opposing bills in Parliament, conducting actions or suits, &c., preparing leases, &c., and also he be paid all travelling and other expenses out of pocket:"—

Held, that he was entitled to be paid all such extra costs as were *bona fide* incurred for the purpose of warding off threatened litigation, whether litigation did or did not in fact result. *Regina v. Prest*, 250.

2. *Retainer.*] Although a town clerk, who has acted as solicitor to a municipal corporation, cannot recover his professional costs against them in an action without proving a retainer under the corporate seal, yet, where an order for payment of such costs has been made by the town council, the mere absence of a retainer under seal will not be a sufficient ground for quashing the order under 7 Will. 4, & 1 Vict. c. 78, s. 44, if the costs were incurred under resolutions of the town council. *Id.*

STAMP.

1 *Memorandum.*] A declaration alleged, in substance, that the defendant obtained S. D. as a partner for the plaintiff in his business, upon the terms, amongst others, stated in the declaration; that the plaintiff afterwards paid to the defendant 25*l.* for obtaining the said partner, and it was then agreed between the plaintiff and the

defendant, that the plaintiff should accept and deliver to the defendant a bill of exchange for 27l. 10s., payable in eighteen months, upon condition that S. D. should accept the partnership beyond two years, but if S. D., at the expiration of eighteen months, should give notice of his wish to retire from the partnership, and not rescind it, the said bill should be null and void; that in consideration of the plaintiff's delivering the said bill, accepted, to the defendant upon the said condition, the defendant promised, if he should negotiate it, and the said notice were given, and not rescinded, to indemnify the plaintiff from the payment of the said bill and all costs, &c.; that the defendant afterwards negotiated the bill; that the plaintiff had been compelled to pay the amount; that S. D. gave notice, at the end of eighteen months, of his wish to retire from the partnership, and did not rescind the same. Breach, that the defendant had not indemnified the plaintiff from the payment of the said bill.

The defendant pleaded *non assumpsit*, and a traverse of the condition upon which the bill was given; and at the trial, the following unstamped document, signed by the defendant, was admitted, as part of the evidence on behalf of the plaintiff:—

"Mem.—I have this day received of Mr. Fenwick de Porquet a bill for 27l. 10s., at eighteen months' date, on condition that Mr. Samuel Douglas accepts the partnership beyond two years; but should Mr. Douglas give notice at the expiration of eighteen months, (the bill to be null and void,) and not afterwards rescind the same:"—

Held, that the document had been properly received in evidence without an agreement stamp. *De Porquet v. Page*, 265.

2. *Agreement Stamp.*] The following document was held to be admissible in evidence stamped as an agreement and not as a receipt: "I have received your cheque for 391l. 10s. 3d., being the payment for an overdue bill and interest, in the hands of the Derby and Derbyshire Bank, and I hereby undertake to procure and hand the said bill over to you, and I have now given you Messrs. Dixon's order for 500 tons of iron." *Van Dadelzen v. Swain*, 459.

See EVIDENCE.

STATUTES CITED, EXPLAINED, &c.

43 Eliz. c. 6, s. 2.	Costs,.....	407
7 & 8 Will. 3, c. 25, }	Conveyances,	339
10 Anne, c. 23. }		
4 Anne, c. 16, s. 25.	Costs,.....	388
9 Geo. 1, c. 7, s. 8.	Appeal,	304, 311
28 Geo. 3, c. 36, s. 6.	Freeholder's Oath,.....	329
37 Geo. 3, c. 90, s. 31, }	Readmission of an Attorney,	264
6 & 7 Vict. c. 73, s. 25. }		
53 Geo. 3, c. 141.	Annuities,.....	296
53 Geo. 3, c. 159.	Ship Owners,	637
55 Geo. 3, c. 51.	Borough Rate,	418
7 Geo. 4, c. 46, s. 13.	Execution,.....	357
7 & 8 Geo. 4, c. 29.	False Pretences,.....	533, 537
7 & 8 Geo. 4, c. 71, s. 2.	Costs,.....	439
11 Geo. 4, & 1 Will. 4, c. 66, s. 3.	Forgery,	589
4 & 5 Will. 4, c. 74, s. 84.	Paupers,.....	279
5 & 6 Will. 4, c. 76, s. 92.	Borough Rate,	418
5 & 6 Will. 4, c. 83, s. 1 & 5.	Patents,	346
6 & 7 Will. 4, c. 96.	Parochial Assessments,	291
7 Will. 4, & 1 Vict. c. 78, s. 44.	Municipal Corporation,	250
7 Will. 4, & 1 Vict. c. 85, s. 11.	Conviction,	595
1 Vict. c. 26, s. 9 & 21.	Will,	625, 633, 634
1 & 2 Vict. c. 14.	Lunatic,	271
1 & 2 Vict. c. 110, s. 18.	Enforcement of Award,	384
4 Vict. c. 16.	Commissioner of Harrowgate,	281
5 & 6 Vict. c. 35, }	Income Tax,.....	365
8 & 9 Vict. c. 4. }		
6 & 7 Vict. c. 18, s. 74.	Mortgagee's Rate,.....	329
6 & 7 Vict. c. 65.	Copyright,.....	269
6 & 7 Vict. c. 73, s. 25.	Attorneys,.....	264
7 & 8 Vict. c. 62, s. 1.	Arson,.....	592

8 Vict. c. 16, s. 26. Companies Clauses Consolidation Act,.....	522
8 & 9 Vict. c. 16, s. 36. Execution,	357
8 & 9 Vict. c. 16. Register,.....	414
8 & 9 Vict. c. 18, s. 25. Appointment of Arbitrators,.....	410
9 & 10 Vict. c. 95, s. 90, 95, 98, 99, 128, 129. Practice,	501, 504, 514, 516
9 & 10 Vict. c. 127. Sanitary Act,.....	291
11 & 12 Vict. c. 42, s. 18. Criminal Law,.....	540
11 & 12 Vict. c. 44, s. 1 & 2. Jurisdiction of Justice,.....	298
11 & 12 Vict. c. 45, s. 73. Winding-up Act,.....	487
12 & 13 Vict. c. 10. Mutiny,.....	575
12 & 13 Vict. c. 45. Order of Quarter Sessions,	310
12 & 13 Vict. c. 76. Defilement of Women,.....	581
12 & 13 Vict. c. 106, s. 78, 86, 107. Bunkruptcy,	231, 392
13 & 14 Vict. c. 61, s. 16. Costs,.....	512, 514

SUBPCENA.

See WITNESS.

SURETY.

1. *Alteration of Contracts.*] In a bond by cautioners (sureties) for the careful attention to business and the faithful discharge of the duties of an agent of a bank, it was provided, "that he should have no other business of any kind, nor be connected in any shape with any trade, manufacture, or mercantile copartnery, nor be agent for any individual or copartnery in any manner of way whatsoever, *nor be security for any individual or copartnery in any manner of way whatsoever.*" The bank subsequently, without the knowledge of the sureties, increased the salary of the agent, *he undertaking to bear one fourth part of all losses which might be incurred by his discounts* :—

Held, affirming the decision of the majority of the Court below, that this was such an alteration of the contract, and of the liability of the agent, that the sureties were discharged, notwithstanding that the loss arose, not from discounts, but from improper conduct of the agent. *Bonar v. Macdonald*, 1.

2. *Liability of Sureties.*] The defendants, as sureties for one J. L., executed, on the 6th October, 1846, a bond to the plaintiffs, who were Commissioners under the Income-tax Acts, by which bond, after reciting that J. L. had been duly appointed collector of the duties granted by those acts assessed within the parish of M., and that duplicates of the assessments had been delivered to J. L., with a warrant for collecting the same, the defendants became bound for the payment of all such sums assessed and collected for the year ending April, 1847, or to be assessed and collected in such parish by J. L. as such collector as aforesaid. A duplicate of the assessment of duties under schedule (A) of stat. 5 & 6 Vict. c. 35, made on persons in M. for three years ending April, 1847, had been delivered to J. L. by the plaintiffs, together with a warrant for collecting the same; but no such duplicate of assessments under schedule (D), nor warrant for collecting, had been delivered to J. L. On the 14th October, 1846, J. L. died, having received previously some of the duties, under schedules (A) and (D) for the year ending April, 1847, for which he had given the usual receipt as collector :—

Held, that the defendants were not liable in respect of the duties received under schedule (D), as, for want of the duplicate and warrant, J. L. had not at the time authority to receive the same. *Kepp v. Wiggett*, 365.

See PLEADING, 4.

SURETY FOR THE PEACE.

See PARTNERS.

SURPLUSAGE.

See PLEADING, 14.

SURRENDER.

See PLEADING, 7.

SURVIVORSHIP.

See PARTNERSHIP, 3.

TESTATOR, INSANITY OF.

See WILL, 3.

THEOLOGICAL DOCTRINES.

See BAPTISM.

TIME.

See SURPLUSAGE.

TRESPASS.

1. *When maintainable against a Justice.*] Sections 1 and 2 of 11 & 12 Vict. c. 44, are to be read together, and sect. 2 applies only to those cases where the act, in respect of which the action is brought against the justice, is itself an excess of jurisdiction. And where a justice convicted the plaintiff in a penalty, and adjudged it should be levied by distress and sale, but exceeded his jurisdiction in ordering plaintiff, in default of payment, to be set in the stocks, which, however, was never done, but penalty was levied by distress, trespass for seizing the goods was held not within sect. 2, and was not maintainable by reason of sect. 1. *Barton v. Bricknell*, 298.
2. *By public Officers.*] A messenger of the Court of Bankruptcy, who takes the goods of a stranger, though in the *bona fide* belief that they are the goods of the bankrupt, which, by the warrant of the Court, he is directed to take, is not entitled to the protection of the 12 & 13 Vict. c. 106, s. 107, but is liable to an action of trespass, without there being any demand of the perusal of such warrant. *Munday v. Stubbs*, 392.
3. *Mesne Profits—Entry.*] A party having mortgaged his premises to the plaintiff in 1846, and being allowed to remain in possession, let them in 1848 to the defendant. In October, 1849, the plaintiff, without having made an entry on the premises, or having been otherwise in possession, brought ejectment against the defendant, who gave his consent to a Judge's order dated the 31st of October. The order directed proceedings to be stayed till the 15th of November then next, the tenant in possession undertaking on that day to give up possession to the plaintiff, and that in default the plaintiff should be at liberty to sign final judgment and issue execution against the tenant for the costs of such judgment, execution, writ of possession, costs of levy, &c. On the 15th of November the plaintiff first entered into possession of the premises, and brought an action for mesne profits accrued between November, 1848, and the 15th of November, 1849:—
Held, that the plaintiff, not having been in possession of the premises prior to the 15th of November, could not maintain the action, his entry on that day not having relation back to his title as mortgage; and that the Judge's order made no difference in the case.
The doctrine of entry by relation applies to the case of disseisor and disseizee only. *Litchfield v. Ready*, 460.

USURY.

See PLEADING, 15.

UTTERING AND PUTTING OFF.

See COUNTERFEITING.

VERDICT.

See INDICTMENT, 5.

WAGES.

See SEAMEN'S WAGES.

WARRANT.

See TRESPASS. BOROUGH RATE. HABEAS CORPUS.

WARRANTY.

Sale with all Errors.] The defendant, being the owner of a ship, inserted the following advertisement in the *Shipping Gazette*: "The fine teak-built bark *Intrepid*, A 1,
61"

2864 tons register, built under particular inspection at Coringa, in 1842, of the best material, shifts without ballast, carries a good cargo, has a poop, and excellent height between decks, and is well adapted for a passenger ship; length 91½ feet, breadth 22 feet 8 inches, depth 16 feet 8 inches; now lying at the St. Katherine Docks. For inventories and further particulars apply to J. H. Arnold, 3 Clement's Lane, Lombard Street."

The plaintiff, having seen the ship, entered into a written agreement to buy her, "as she now lays in the St. Katherine Docks, agreeable to the inventory annexed." This document commenced thus: "For sale by private contract the fine teak-built bark *Intrepid*," &c., pursuing the terms of the advertisement down to the words "St. Katherine Docks." Then followed this statement: "Hull, masts, standing and running rigging, with all faults as they now lie." Under this was the word "inventory," which was followed by a list of the ship's stores and tackle; and the document concluded with these words: "The vessel and her stores to be taken with all faults as they now lie, without any allowance for deficiency in length, height, quantity, quality, or any defect or error whatever. For inventories and further particulars apply to J. H. Arnold, 3 Clement's Lane, Lombard Street, London."

The defendant signed his name to this inventory, opposite to the list of the ship's stores. The vessel proved not to be teak-built, nor of class A 1, nor adapted for a passenger ship:—

Held, that the defendant was not guilty of a breach of warranty. *Taylor v. Bullen*, 472.

WILL.

1. *Alteration of.*] The deceased duly executed her will, using the name "Higgins" in the body of the will and in the signature. Subsequently the writer of the will, by her directions, erased the name "Higgins," and substituted that of "Redding," and the deceased re-signed the will, using the name "Redding," but there was no re-execution:—

Held, that, in the absence of intention to revoke, the will was entitled to probate as originally executed. *In the Goods of Redding*, (ec.) 624.

2. *Alterations.*] Where the signature of the testator and the subscription of the witnesses are made in the margin of the will, near the alterations, the Court will decree probate of the will with the alterations, without requiring any affidavit as to the time when the alterations were made. *In the Goods of Wingrove*, (ec.) 625.

3. *Insanity of Testator.*] An article, pleading a declaration of an attesting witness that the testatrix was insane in March, 1850, and had been so for years, the will being executed in May of the same year, was rejected as immaterial. *Yglesias v. Dyke*, (ec.) 626.

4. *Will made under a Power.*] An allegation, propounding a will and codicil alleged to have been made by virtue of certain powers under a deed of settlement, did not plead the deed of settlement:—

Held, that the deed should be pleaded as an exhibit. *Este v. Este*, (ec.) 629.

5. *Barnes v. Vincent*, 5 Moo. Pri. C. C. 201, considered. *Ib.*

6. *Signature to.*] When sufficiently signed at the "foot or end," to be within the stat. 1 Vict. 26, s. 9. *Jermyn v. Hervey*, (ec.) 633. *In the Goods of Anderson*, (ec.) 634.

WINDING-UP ACTS.

1. *Provisional Committee-man, when liable.*] A provisional committee-man is not liable, as a contributory, to the other members of a committee for his proportion of expenses incurred by them, unless he has expressly or impliedly authorized them to pledge his credit. *Cottle*, ex parte, 9.

2. *Provisional Committee-man.*] J. U. had allowed his name to be placed upon the list of the provisional committee-men of a proposed railway, but had never in any manner acted as such in the affairs of the company. The managing committee apportioned 100 shares in the company to each provisional committee-man; and the secretary of the company announced this by letter to J. U., in answer to which he wrote, "I accept the 100 shares allotted to me;" writing after his signature "P. C.," (Provisional Committee-man.) A few days afterwards the secretary forwarded to J. U. a regular letter of allotment of the 100 shares, requiring the deposit to be paid into one of the banks therein named, on or before a certain day, "or this allotment will be null and void." J. U. never took any notice of this, and never paid the deposit. No complete allotment of shares was ever made, no act of Parliament was applied for,

and the project was abandoned; but preliminary expenses having been incurred, the company was ordered to be wound up:—

- Held*, that J. U. was a contributory in respect of 100 shares; and that, irrespective of the question of partnership, the effect of a provisional committee-man accepting the allotment of 100 shares was an implied authority to his co-committee-men to pledge his credit for his proportion of the necessary expenses in preparing to launch the concern. *Upfill's Case*, 13.
3. *Semble*, this company, or association, had advanced to that state which rendered it a proper subject of an order under the Winding-up Acts. *Ib.*
 4. *Staying Proceedings.*] When a Judge's order is made under the Joint-stock Companies Winding-up Act, 11 & 12 Vict. c. 45, to stay proceedings until after the plaintiff shall have "made or exhibited proof" of his debt or demand before the Master in Chancery; on allowance of that proof by the Master in Chancery, the power of the Judge to stay proceedings is at an end. *Prescott v. Hadow*, 487.
 5. *Quere*, whether for this purpose allowance of proof, or any other act, is necessary to be done by the Master in Chancery. *Ib.*

WITNESS.

Right to Compensation.] A party served with a subpoena in a civil action, receiving a sum of money therewith, and making no further demand, may maintain an action against the party on whose behalf he has been subpoenaed, for additional expenses incurred by him in attending the trial, but not for loss of time. *Pell v. Daubney*, 450.

See EVIDENCE, 5.

END OF VOL. I.

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